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MINORITY MEMORANDUM ON
FACTS AND LAW

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# HEARINGS

BEFORE THE

# COMMITTEE ON THE JUDICIARY
# HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

SECOND SESSION

PURSUANT TO

H. Res. 803

A RESOLUTION AUTHORIZING AND DIRECTING THE COMMITTEE ON THE JUDICIARY TO INVESTIGATE WHETHER SUFFICIENT GROUNDS EXIST FOR THE HOUSE OF REPRESENTATIVES TO EXERCISE ITS CONSTITUTIONAL POWER TO IMPEACH
RICHARD M. NIXON
PRESIDENT OF THE UNITED STATES OF AMERICA

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JULY 22, 1974

Y4. J89/1: M66/2

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37-496 WASHINGTON : 1974

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# EXECUTIVE SESSION
# IMPEACHMENT INQUIRY

MONDAY, JULY 22, 1974

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The committee met, pursuant to recess, at 10:50 a.m., in room 2141, Rayburn House Office Building, Hon. Peter W. Rodino, Jr. (chairman) presiding.

Present: Representatives Rodino (presiding), Donohue, Brooks, Kastenmeier, Edwards, Hungate, Conyers, Eilberg, Waldie, Flowers, Mann, Sarbanes, Seiberling, Danielson, Drinan, Rangel, Jordan, Thornton, Holtzman, Owens, Mezvinsky, Hutchinson, McClory, Smith, Sandman, Railsback, Wiggins, Dennis, Fish, Mayne, Hogan, Butler, Cohen, Lott, Froehlich, Moorhead, Maraziti, and Latta.

Impeachment inquiry staff present: John Doar, special counsel; Samuel Garrison III, minority counsel; Albert E. Jenner, Jr., senior associate special counsel; and Bernard Nussbaum, counsel; Richard Cates, counsel; Evan Davis, counsel; and Ben Wallis, counsel.

Committee staff present: Jerome M. Ziefman, general counsel; Garner J. Cline, associate general counsel; Alan A. Parker, counsel; Daniel L. Cohen, counsel; William P. Dixon, counsel; Arden B. Schell, counsel; Franklin G. Polk, associate counsel; Thomas E. Mooney, associate counsel; Michael W. Blommer, associate counsel.

Also present: James D. St. Clair, special counsel to the President; John A. McCahill, assistant special counsel; and Malcolm J. Howard, assistant special counsel.

The CHAIRMAN. Good morning.

As had been previously noted we were scheduled to hear Mr. Garrison and I understand that Mr. Garrison is ready to present his briefing, and as we did in the case of Mr. Doar, the Chair hopes that we would permit Mr. Garrison to go on and to complete his statement before any questions are directed.

Mr. Garrison.

Mr. GARRISON. Thank you, Mr. Chairman, and ladies and gentlemen of the committee. Good morning.

First, I would like to thank the chairman and the committee for giving me this opportunity to present views relating to the question of the impeachment of the President. I distributed to you a little cartoon that appeared in the newspaper this morning, and I did it for two reasons. One, frankly I think it is funny, but secondly, to the extent that one would take a serious connotation to the concluding frame of that cartoon, I would like to utilize that device to express a contrary view.

As a member of the staff, having sat through just about every session

of the committee during the course of this inquiry, I would like to associate myself with those who have described these proceedings as eminently responsible, fair and indicative of an effort to establish the truth. To the extent that views have been expressed elsewhere to the contrary, I disassociate myself from those views.

Now, with respect to the presentation of written materials that I had told you last week we hoped to have available today: in fact, for a variety of basically mechanical and administrative problems, which I am sure you can appreciate, given the short time we have had to work on this, we have simply been unable to prepare more than a small portion of those materials for distribution today. During the rest of the week, sections relating to the discussions of the facts and the law in such other areas of the inquiry as time and manpower permit will be distributed to the Members in the belief that so long as the committee is still in the process of deliberating on this matter, it is appropriate to provide views on the facts and the law.

In addition to stating my immense gratitude to the minority staff for their almost super-human efforts these several days, I want to express my appreciation to Mr. Doar's staff for the full cooperation which they have shown in assisting the minority lawyers in preparation of this memorandum. I would like also to say that this is indicative of the spirit of good will and principle which Mr. Doar has exhibited throughout this inquiry.

The subject of my presentation this morning I think could best be described as the role of politics, with a capital P, in the impeachment process. And by that I mean, ladies and gentlemen, of course not the role of partisan politics, but the role of politics in the sense of government policy—determinations of what is in the public interest.

I would like to discuss the role of politics in the context of several topics. One, the nature of this institution; two, the House of Representatives; three, the nature of the impeachment process; four, the nature of this inquiry and finally the nature of the facts.

As a previous member of the permanent staff of this committee, I have had and do have nothing but the ultimate regard and respect for the House of Representatives as an institution. I was delighted to have the opportunity to come to this committee's staff in December of last year to work on this project.

But, it is important to note that this is a political body in the finest sense of the word. The House of Representatives is designed to function as a representative of people. It is essentially bipartisan, and not nonpartisan, in composition, and I think that any congressional enterprise should reflect the character of the institution.

It has a bearing on the question of the factfinding process here to discuss briefly the nature of the role of the staff in the conduct of this inquiry. And if you will bear with me, I would like to do that for a moment. I think it would be absurd to appear here this morning, in whatever capacity I am appearing, without making any note of the evolution of the staff structure in recent days and weeks. A nonpartisan staff, which is the concept upon which this state was founded in December and January, is not unprecedented in the history of Congress, but it is certainly a typical. Only where there is an area of inquiry which requires a great deal of expertise, which is true in the case of the joint

committee, a modification of the normal congressional system of staffing is deemed appropriate.

But, I would like to make the point again, only because I think it has relevance to the question of the factfinding process, and frankly I am delighted to be able to make the point openly, looking the Members in the eyes, not covertly: in retrospect, I am sorry that the staff was established from the outset as a nonpartisan staff. I think the Members on both sides of the aisle would have been better served if there had been a concept prevailing in the nature of bipartisanship rather than nonpartisanship.

The reason I say that is because, I think, unlike those who have not had the experience of working either with or in a bipartisan staff, I felt, when I worked on this committee staff the first time around, that the degree of mutual trust and cooperation between the minority and majority members of this committee staff was one of the most impressive things that I had experienced in my brief political career. I think that we may have, in an effort to assure the appearance of fairness—and I know this was precisely the motivation, an effort to let the country know that we were all trying to be fair about this matter—simply ignored the benefits to the factfinding process that a recognition of partisan interests that differ would have provided.

The CHAIRMAN. May I interrupt you? And I think it is important that I do interrupt you, Mr. Garrison.

I think that I would be less than fair and candid with this committee if I were not to state that this surprises me that you harbor this kind of an opinion, because if you will recall when Mr. Hutchinson first sent you to see me, and met with me before you were officially hired, I asked whether or not in your view you would take any position other than a nonadvocate, nonpartisan position and I told you then and there that if I thought that you would take an advocate position, I could not, in good conscience, hire you. That was the understanding that I had had with Mr. Hutchinson and you then and there agreed with me that would be the position and the only position that you felt fair to take.

Now, I state that because I believe that it is important that that be on the record.

Mr. GARRISON. I agree entirely, Mr. Chairman, that was exactly what you and I discussed and that is why I used the phrase in my presentation that in retrospect I think it was probably a mistake to have established a staff structure which was based upon an erroneous premise that people don't tend to divide philosophically along very, very general lines. And I am thinking of it functionally, also, in terms of the service provided to the members of the committee.

But the chairman is absolutely correct that the original staff structure was one which I had had a part in creating.

I would point out that the question of partisan representation on the staff, though, does not have to be a matter of fighting and scheming and all of the negative things which the public might associate with partisanship. And I would like to point out, for example, that in the selection of minority staff members for this inquiry, in fact 3 of the 11 minority lawyers that I hired have been or are registered Democrats, which is a somewhat higher ratio, if you want to look at

it in those terms, than the 2 or 3 registered Republicans out of 27 majority lawyers.

Now, my only point is that I have never viewed it as the role of Minority staff simply to grind a partisan ax or to be an advocate in its own right. The only advocacy in which any members of the staff are really entitled to engage is that on behalf of their Members, on behalf of their clients, but it is that very advocacy of our clients' viewpoints which I think in the context of this inquiry was unfortunately suppressed, and I think it was done so because of the system and not because of anyone's intention to do so.

Mr. McCLORY. Mr. Chairman, may I make a comment, perhaps relevant to the comment you made and the statement that Mr. Garrison is making now? Because I was a strong supporter of the bipartisan staff, the integrated or bipartisan nature of the staff, and I think that it was, I think it was eminently successful, and I have felt that the staff presentation throughout the entire investigative portion of the inquiry was completely fair and impartial and objective.

The reason I think that we are at this—we are experiencing this sort of shifting staff, or change in status perhaps of staff service, is that at the end of the objective inquiry we come to a point where we have to be decisionmakers and we do have to, we do have to be represented as a Republican and Democratic members of this committee regardless of our views, not that they are diametrically opposed or that they are uniform on one side or the other, which they are not.

And so, I would just like to—well, since the tangent that the gentleman is talking about and so I just think that it is appropriate at this time that this partisan or this minority position be emphasized and be represented.

Mr. FLOWERS. Mr. Chairman, are we going to get to the facts sometime this morning?

The CHAIRMAN. Mr. Garrison, please proceed.

Mr. GARRISON. Thank you. The train of thought I was developing, ladies and gentlemen of the committee, is that, in fact, there were implications for the factfinding process in terms of the way that the staff was organized, and that those were sometimes good, sometimes bad in terms of what Mr. McClory referred to as the bipartisan or nonpartisan staff products. Sometimes a presentation of facts was diluted from what it would have been, the force of them, if the minority were not involved, but the unfairness to both sides was that they were diluted enough to make them not quite pleasing to the majority, but they could never be stated in a manner which was really worthy of the endorsement of the minority.

Now, at this point, therefore, we have arrived at a statement of matters which were not brought to the attention of the committee in the presentation by Mr. Doar last week, and this is to serve the function, as I view it, of one counsel as part of a team of counsels being sure that in the time allowed we have not only one side of the facts to view, but all of the revelant considerations.

And I want to turn now to the role of politics in the impeachment process. The framers considered and rejected placing impeachments and the trial of impeachments in the judicial system. Proposals for having the matter adjudicated by the Supreme Court or in a Special Court of the Nation established only for the purpose of trying im-

peachments was fully discussed, and a conscious decision was made that this grave matter of removing an officer of an independent, coordinate branch of the Government would be reserved to the most representative body of the three branches of Government, the Congress. We have therefore, a political body reviewing evidence relating to whether or not political crimes, and I use that word crimes without regard to whether there are statutory offenses involved or not, but reviewing whether political crimes have been committed by a political officer of another branch of Government.

These political considerations relating to the public welfare and policy of the Government are in the impeachment process legal considerations, because it is a political process, political considerations are a part of the law of impeachment.

This concept is expressed at pages 9 and 10 of the introduction which was distributed to you this morning, and the only point that is being made here is that, in our view, impeachable offenses are those for which, under the Constitution, impeachment and removal by the Senate are legally permissible. It is also our view that there is no impeachable offense for which the sanction of removal is mandatory.

The House in the first instance and the Senate thereafter exercise political judgment which I construe to mean simply balancing the public interest in the premises. The question facing the committee, and thereafter the House, is not simply whether the President did whatever may be alleged. The question is, did the President do it, and if so, what are the implications of that for the Nation in the light of all competing public interests.

In exercising its discretion whether to impeach, the House, and thereafter the Senate, if impeachment occurs, exercises a discretion which, in my judgment, is reviewable only by the people, not by the courts. It is not only permissible, but it is essential to the character of the process, that those political judgments be made.

My own view of the role of the House is that of all of those institutions or roles in other areas of the law to which the House might be analogized, that the role of prudent prosecutor is the most apt. The prudent prosecutor begins his inquiry without bias towards the suspect. He proceeds to gather the evidence from every source, to reach a judgment as to whether the individual should be prosecuted.

I tend to feel that the House of Representatives is really to be considered in the role of prudent prosecutor. The House doesn't simply decide that the President should be impeached, if that is its judgment, and then leave it to someone else to go about accomplishing the removal. The House decides whether it will seek to accomplish the removal by going to the Bar of the Senate, bringing the charge from the House and proceeding to prosecute the case.

It seems to me that when your staff reviews the facts and the law pertinent to this inquiry, what we are really doing is serving as your in-house counsel, assisting you to advise, in turn, the rest of the prosecuting body whether or not, simply, there is a case. And I would suggest that you consider whether there is a case that you can win, in the sense that the evidence is sufficient to warrant a reasonable belief on your part that the outcome of the process will be that which the House seeks when it goes to the Bar of the Senate; namely, removal—a successful prosecution, in other words.

Now, I realize that there can be different views on this. We have prepared a memorandum on the standard of proof, which will be distributed this week as a part of the minority memorandum, and some of the policy considerations which we feel bear upon selecting the appropriate standard of proof are discussed in that memorandum: the analogy to the grand jury and the analogy to the role of the prosecutor.

But, the bottom line, as it is said, of that memorandum, I think, basically is this: that when a member of the committee or a Member of the House votes to impeach, he should do so having made a judgment that the evidence convinces him that the President should be removed from office. Now, some might say, well, isn't that self-evident. Not necessarily. Some feel that you should only determine whether the President might be removed from office on the basis of the facts.

It is our view that the proper test is whether, in voting for impeachment, the member feels the President should be removed from office, that the prosecution should succeed.

The standard of proof does not apply to the law. Standards of proof never apply to the law. One must be convinced as a matter of law that the offense, if proved, is constitutionally a valid charge. One then, we feel, must be convinced in the exercise of his political judgment that the best interests of the Nation warrant removal rather than retention of the officer.

Then comes into play the standard of proof: the sufficiency of the evidence relating solely to the facts—what really happened, what did the officer do—and it is our view that in reaching a decision as to the sufficiency of the evidence that the members of this committee and the House are again in the role of the prudent prosecutor, who looks over the case, and does not engage in a prosecution which will fail, being concerned not simply about embarrassment in a prosecution that fails, but in the way in which an unsuccessful prosecution affects the public interest.

It would be unfair to the President, it would be embarrassing to the House and, for both reasons equally, it would be tragic for the Nation if the committee were to recommend to the House an impeachment in which, when evidence were laid out in a trial-type situation, a fully contested situation, the evidence fell short.

It always seemed to me, frankly, during the inquiry that it was in the interest of the committee equally as much, if not more, than of the President to utilize devices such as cross-examination and every other rigorous test of the evidence, so that in reaching that judgment as to the sufficiency of the evidence, one would have the maximum degree of confidence as to how the evidence would stand up when subjected to an adversary proceeding.

There are certain problems in this evidence which I think, as one of your counsel, I would have to point out to you, just as if I were on your staff, and you were the U.S. Attorney, or the Attorney General, and you were trying to determine whether or not to initiate a prosecution. You would want someone there to be—I will not use the phrase commonly used to describe playing the role of testing the evidence—but someone who will, in fact, point out the soft spots.

One special factor I would like to take note of here is that reliance has been placed heretofore on utilization of so-called adverse inferences against the President in framing the case against the President. I think

that that bears much more analysis that I have heard from counsel's table so far in the inquiry. We have set out on pages 3 and 4 of the introduction some of the considerations which we think you should have in mind in assessing what the actual utility of the so-called adverse inferences from nonproduction of subpenaed material by the President might be if you were in a trial, and were seeking to rely on them in part in proving a case.

I would call your attention particularly to the statement on page 3 of that introduction, in paragraph D, in which is given the rule of law. A jury should not be allowed to draw any inference from circumstantial evidence if that evidence permits two inferences, one as probable as the other.

I would also like to point out in this discussion on pages 5 and 6 that the question of whether an adverse inference actually arises as a result of the President's failure to supply subpenaed materials is a complicated one. It is not enough to just say, well, we asked for this, we didn't get it, and an adverse inference arises.

Under ordinary rules of law, the question of whether any such inference arises is a function of several factors. First, there is the question of whether a valid privilege of some type pertains to the evidence sought. There, of course, is the question of executive privilege in this case. The members all, I am sure by now, have formulated their own personal views on the force of the committee's arguments on the question of executive privilege vis-a-vis the President.

I would suggest to you that there is at least theoretically another possible privilege that could become applicable in the Senate trial; namely, the privilege against self-incrimination, and I could see that an argument could well be made by the President's counsel that under all of the circumstances, it was not even necessary for the President to claim the privilege, since he was clearly under investigation for offenses which, by definition, in the impeachment process, are crimes, political crimes.

I think you should view the question of impeachment as a process in a very comprehensive way. I view this as a separate track in our legal system in which prosecutions for crimes, within the meaning of the phrase "high crimes and misdemeanors," are instituted and culminated. And I think that if you read the various provisions of the Constitution relating to criminal offenses, you can see that there is at least some room for argument that the fifth amendment privilege could apply to the production by the President of Presidential documents in an impeachment proceeding, because by definition what is being investigated is an impeachable crime.

Mr. HUNGATE. Pardon me. Do you mean without claiming it, Mr. Garrison?

Mr. GARRISON. I would suggest that increasingly, Congressman Hungate, today attorneys are arguing in courts that the legal requirement of claiming the privilege is itself a prejudice to the defendant; that where reasonably in the circumstances it can be seen that the privilege applies, the person who possesses the privilege ought not to be forced to claim it.

I think there was a thread on that running through the argument by Mr. Mitchell's counsel in this proceeding and I am not at all saying, Congressman Hungate, that I support that theory. I am only suggest-

ing that in looking at the propriety of the President's refusal to produce subpenaed documents, I am pointing out an additional argument which possibly could be made. Today's novel theory, of course, is sometimes tomorrow's case law.

Mr. McCLORY. Could I ask a question, Mr. Chairman, for clarification? That is on the subject of executive privilege, which I think we must all recognize, at the same time, don't you feel that this body, as a unit of the House of Representatives, is the forum which must judge whether or not executive privilege is applicable?

Mr. GARRISON. Yes. Yes, I do.

Mr. McCLORY. Thank you.

Mr. GARRISON. But, to complete the answer, in so judging, this body itself must interpret the Constitution.

Mr. McCLORY. Right.

Mr. GARRISON. And that interpretation may require a self-imposed restriction on this body's ability to compel the production of evidence.

Mr. McCLORY. But we can adjudicate that ourselves as the forum for making the determination without going to the courts I mean.

Mr. Garrison, I would agree, Congressman.

Ms. HOLTZMAN. Mr. Chairman, point of clarification.

Mr. Garrison, I am not sure I understand your position. Are you stating that the committee ought to view the President's claim of executive privilege as though it were an assertion of the fifth amendment, so that we cannot draw an adverse inference from his failure to supply to the subpenas? Is that the position you are advocating?

Mr. GARRISON. Ms. Holtzman, I am not advocating that position; I am presenting for your consideration the possibility that in the context of an impeachment inquiry, the privilege against self-incrimination conceivably might apply to the production of materials which are relevant to the inquiry, just as in an ordinary criminal prosecution it applies to the production of materials relevant to the criminal prosecution.

Ms. HOLTZMAN. I know. But I assume we are not talking about some hypothetical matter that have no relevance to what we are supposed to decide, and so I gather and I——

Mr. GARRISON. That is right.

Ms. HOLTZMAN. I gather what you are suggesting is that the fifth amendment claim has some relevance because we are supposed to judge the President's noncompliance with our subpenas as though it were a claim of the fifth amendment. Is that correct?

Mr. GARRISON. I am suggesting that this is only a possibility, and I would suggest further, of course, in that in any invocation of the fifth amendment, privilege, relevance is necessary for the privilege to be valid, rather than the reverse. Only a relevant document would be one to which the privilege would apply.

Mr. WALDIE. Mr. Chairman?

The CHAIRMAN. Why don't we permit Mr. Garrison to go ahead. He hasn't much time, and I think that in all deference to the fact that he has that little time, that we permit him to make the presentation.

Mr. GARRISON. Thank you, Mr. Chairman.

Mr. DANIELSON. Is that ruling going to apply to everyone, Mr. Chairman?

The CHAIRMAN. Yes, it will.

Mr. GARRISON. Well, I would like to proceed though away from the fifth amendment, which I did not intend to emphasize this much, to a further discussion of the inference question, because I think we would have to agree that that has been one of the more significant aspects of the evidence in this case, the President's failure to produce a number of subpenaed materials.

The real question, it seems to me, and this is discussed on page 7 of the introduction, in section (b) or paragraph (b) on that page, supposing that there is no valid claim of privilege, and supposing that there is no other legal bar to an inference arising according to the discussion in the introduction, the real question is what is the inference, what is the probative force of the inference?

And I am not sure that it is really helpful to the committee to have that subject brushed over as lightly as I think it has been heretofore: "Well, we have subpenaed 18 tapes in the milk case. We didn't get any of them. An adverse inference will arise."

Well, an inference can only have content according to context. It can only mean something in relation to what was expected to be produced. Certainly, in the ordinary trial situation, you do not have a general vague inference if you subpena a letter from the opposite party and you tell the court what the letter relates to, and then the letter is not produced. You don't have just a vague inference against the party. You have a fairly specific inference. The subject matter, as identified by the party requiring production, would have been sufficient as to be adverse on the opposite party's case.

Then, I would suggest, and obviously we don't have time to go on a case-by-case basis because of all of the number of matters subpenaed by this committee, but I would suggest that in many, if not most, instances, even though I have been consistent throughout this inquiry in supporting the justifications that the staff produced for the materials to be subpenaed, that the nonproduction of most of the conversations could give rise to an inference, if any, having no more probative value than that there was something in the conversation that the President thought might be somehow damaging to him in some aspect of this inquiry.

And I would suggest that is so because, even though the facts which constituted our justification for issuing the subpena may have pertained to a particular subject that we thought perhaps was the subject of discussion in the conservation, the reason for the nonproduction may well have been that there was something else in the conversation, whether it was the expletives deleted, at the stage before the transcripts were released or what. I only suggest to you that we have talked about adverse inferences heretofore as if, if this case were to go to the Senate and managers of the House were to begin presenting evidence, they would be able periodically in the presentation of that evidence to reach into a quiver and pull out an arrow of adverse inference for evidence, and I am suggesting, ladies and gentlemen of the committee, that you might reach in the quiver and pull out a bunch of toothpicks and it doesn't matter how many toothpicks you pull out, they won't kill a bear.

Now, turning to the facts of the Watergate situation, it is our view that the essence of the case is whether or not the President, at any time from the 17th of June of 1972 to the present day, did knowingly and

with intent, join a criminal conspiracy to obstruct justice in the official investigation of the Watergate burglary of the Democratic National Committee headquarters on June 17, 1972.

It is also our view that the answer to that question, yes or no, is not itself dispositive of the case for the reason I advanced earlier, that in a political process, with a capital "P," in addition to the finding of fact, there is also the rendering of judgment as to whether the facts require removal of the officer.

I recognize that there are theories of law which have respectable support, that it is not essential in deciding the question of removal to first decide that a crime was committed. I would suggest, however, that in the Watergate fact situation, where the President has been named as an unindicted coconspirator by the grand jury for the U.S. District Court in the District of Columbia, and where this committee has great volumes of information on the subject, it would be very difficult to imagine a justification for removal of the President from office arising out of the Watergate fact situation if there is no showing of criminal liability on the facts. The reason I say that is because the standard, the legal test, for involvement in a criminal conspiracy is really one of the—I hesitate to say lower standards—but one of the less difficult matters of fact to prove in the criminal law. We will present to you a memorandum on the law of conspiracy, and essentially that memorandum will say that you should go through the evidence from June 17, 1972, forward to the present day, and you should at each step of the way scrutinize the facts and circumstances that are urged by Mr. Doar to constitute a case of Presidential direction, knowledge, and involvement in the conspiracy. Scrutinize it very closely to see whether, first, knowledge, which is an essential element of the crime of conspiracy, knowledge by the President as to the existence of the conspiracy and the purpose of it is shown.

Second, an intent to participate in it, participate in the sense to further its objectives.

And third, whether the President engaged in some affirmative action to implement that intent. There is no crime in the American jurisprudence which is made out simply by intent.

I would suggest that conduct sufficient to render the President or any other person criminally liable as a conspirator can consist of words, not actions such as moving around and so forth, words or conduct, and, therefore, it is material at every step of the way to examine the President's words to see whether or not they constitute conduct manifesting an intent to participate in a conspiracy whose existence and purpose he knew about. And I would suggest to you in all candor that the presentation Mr. Doar made to you last week, suggesting that there is direct evidence that the President of the United States was involved in directing a criminal conspiracy to obstruct justice from the beginning, is very unconvincing, and I would suggest that you view that evidence as you would if you were a prudent prosecutor who had to go to the bar of the Senate and prove that the President directed the conspiracy from the beginning: not suspect, not "maybe," but prove that he directed the conspiracy from the beginning. I would suggest to you that at least three U.S. Senators this year have formally stated in remarks on the floor that the standard of proof in the Senate is guilt beyond a reasonable doubt—Senator Ervin, Senator Stennis, and Senator Biden.

I do not know whether the standard of proof in the Senate is proof beyond a reasonable doubt, frankly, and I am not sure that there is a straightforward, clear answer to that, but I would suggest to you as your counsel, that Mr. Doar's case of circumstances showing Presidential involvement from the beginning is a very, very weak one and the reason is because you cannot simply aggregate suspicions. You cannot aggregate inferences upon inferences. You can only aggregate facts to make the case.

As we listened to the presentation last week Mr. Doar started with June 17. He went forward step by step as you must do to see whether at any one moment in time you have evidence, either direct or circumstantial, that the President personally knew of, and intended to take part in, the conspiracy.

How did Mr. Doar start? He said there was a press release issued by Mr. Mitchell and it was false. We had a great deal of examination, it seemed to me hours of examination, during the few days we had for live witnesses about the accuracy of that press release, and I fail to see, ladies and gentlemen, how the accuracy of that press release bears materially upon the issue here, unless one can show, and I did not see it shown, that the President knew of the press release and knew that the facts were false.

Of course, the facts in the press release were false. I did not know that that was ever in issue at this late date. But did the President know that then? Not now, then?

The point was made that the President sat alone in his Oval Office while others met a short distance away, and that is a very dramatic picture that is painted by those words, suggestive that the President was there, consciously wanting not to hear. But the only problem is that that is merely speculation. Do we have any evidence as to why he was alone, what he was reading, what he was doing? Do we have any evidence as to how often many people meet a short distance away and he is not there? Do we have any evidence as to the extent of his knowledge about what was being discussed?

The point is made about the Dean report, that it was fictitious. There was no "Dean investigation," it is said, and yet Mr. Colson told us that everyone in the White House knew that Dean was the staff man in charge, and your statements of information clearly show that John Ehrlichman assigned Dean to find out what was going on, what had happened. I must apologize to the members of the committee most sincerely, I haven't had the time to prepare to give all of the specific tab citations that I would like to, but I think you will recall these items in the evidence. We had several showings that Dean was for all intents and purposes the White House staff man in charge of investigating the Watergate matter, and does it matter at all whether he reported directly to the President in conducting that investigation in determining whether he was conducting an investigation?

Well, of course it doesn't. Is there anyone here who doubts that John Dean was the White House counsel? But apparently he never dealt with the President directly except in very, very limited ways. So the question of whether Mr. Dean goes in and talks with the President about what he is investigating strikes me as really rather a nonissue.

We have—I direct you to page 195 of the book of "Transcripts of Eight Recorded Presidential Conversations." That is the transcript of the conversation between the President and Dean on the morning of April 16, 1973, and in that conversation, at the bottom of page 195, the President and Dean are talking about what Dean might tell the investigators, and the President says:

Let me say, on this point I would, uh, not waive. You could say, "I reported to the President". Uh, that "the President called me in". I mean, the President has authorized me to say—he called me in and, uh, and, uh, asked me——

Dean says, "Uh huh".

The PRESIDENT. Uh, make that, that before, that when the event first occurred, you conducted an investigation and passed to the President the message: "No White House personnel", according to your investigation was involved. You did do that, didn't you?

DEAN. I did that through Ehrlichman and Haldeman.

The PRESIDENT. That's it. You did do that.

DEAN. If I'm under oath, now, I'm going to have to say I did that through Ehrlichman and Haldeman.

The PRESIDENT. No, but I know you did that. I didn't see you.

DEAN. That's right.

Well, so what if he didn't see him? He didn't see him on anything that Dean was doing as White House counsel but that didn't keep him from being White House counsel.

We come to the conversation of September 15, 1972. You will recall that for a period of a year the Nation has been under the impression, as a result of John Dean's testimony before the Senate Select Committee, that on September 15, the President had clearly manifested knowledge of Dean's activities in connection with the actual obstruction of justice. I am not going to go over every line in that transcript. I suggest to you that the first time you read that transcript you must have thought that Dean's characterization of the way in which the President manifested knowledge was at best exaggerated, if not unfounded.

What is it that the President and Dean were talking about on September 15? What were the leaks that the—that Dean had plugged? What services had he performed?

Well, as a matter of fact, there were leaks, actual leaks, you will recall, from the FBI to newspapers. You will recall that Dean was responsible for discussing with Pat Gray the question of those FBI leaks, and he got them stopped because he rode herd on Pat Gray and then Pat Gray rode herd on a few people. They weren't stopped completely, but the leaking was reduced to, we'll say, within tolerable limits.

What else was Dean up to? He was involved in planning the approach of the White House toward the Patman hearings, the proposed Patman hearings, and, of course, they talk about that directly in the conversation on the 15th, and it is at this point that I would like to suggest that once again politics becomes relevant to the consideration of the case but in this instance, I would say politics with a little "p", equally interesting and enjoyable but not perhaps on quite as high a plane in terms of the national interest.

What period of time are we talking about? We are talking about September of 1972, the most political season of the 4-year period, and what else are we talking about? We are talking about a committee of Congress controlled by an opposition party, about to embark upon

hearings into facts which are related to CRP activities, and if you, ladies and gentlemen, were sitting in the White House on that date and were aware that such hearings were about to begin, what would be the principal consideration that you would have if you knew that the party in power in the Congress was the opposite party? I guess it is difficult for most members of the majority to put themselves in that position based on experience, but some of you may recall what it feels like. But I would suggest that the President would instinctively, just as each of you would, think, well, that is going to be a political Donnybrook. Here we are, election time.

Now, when a man who has been a political animal for years, all his adult life, reacts in that fashion to a developing investigation by an opposition controlled committee, is he manifesting guilty knowledge?

In our Introduction, we cited you to a proposition. I want to reiterate it. On page 3 of the Introduction in section "d," a jury—and I am thinking now of the Senate when I say jury, because you are the prudent prosecutor or at least, I think, the committee is like the Criminal Division of an Attorney General's office now deciding whether to advise the Attorney General to prosecute. If you are the Criminal Division, I am simply a counsel there, and I am asking you to consider the rule of law that a jury should not be allowed to draw any inference from circumstantial evidence if that evidence permits two inferences, one as probable as the other.

I simply ask you to reread the transcript of September 15, the comments about plugging leaks, fingers in the dike, and read it from the standpoint of a political person in the most political season of the quadrennium assessing and asking himself, What do you suppose the Democratic Committee up there on the Hill is going to make out of all of this? I would suggest to you that one doesn't have to have a shred of guilty knowledge of anything relevant to this criminal charge of conspiracy in order to react precisely as the transcript reveals the President to have spoken during that conversation.

I would make the same point with respect to the conversation between the President, John Mitchell and Haldeman on the 30th of June relative to the question of Mitchell's resignation. I am sure that the members don't need any convincing that there was the personal problem involving Mrs. Mitchell as a factor, and I don't think the members would need any convincing that if the President and Haldeman and Mitchell had any sense at all, they would have to consider what impression would be conveyed to the country when Mitchell stepped down.

I can recall—I guess maybe I wasn't working quite as hard at that time—I think I was out lying around a swimming pool on a Saturday afternoon and I heard the news that John Mitchell had resigned, and the first thing that went through my mind was probably the same thing that went through yours, hmm, must have something to do with the Watergate matter.

Then, of course, the explanation came that it was because of his wife.

The point of the June 30 conversation is I think very clear, that the longer they waited, the more people would get impressed upon them the facts that were coming out in the newspapers through these leaks that Dean was in the process of trying to plug up by riding herd on

Gray, and the point would come, if it had not come already, when there wouldn't be any way at all that Mitchell could resign without the entire country knowing and believing that it had something to do with the Watergate problem. So, "cut the loss fast." That is the advice I would have given them, without having one iota of guilty knowledge.

We go through the months looking at those points at which there is evidence of Presidential action which could suggest knowledge and we don't really get to a period which might be cause for genuine concern until the month of March. Before we get into that, though, I simply want to reiterate that I think Doar's case for Presidential involvement and direction starting on the first day after the break-in, is more a hypothetical construct than it is a set of facts proved by the evidence, even circumstantially. It is useful as a basis for analysis of the facts, testing the facts against the hypothesis, but it is in essence simply an hypothesis and not a proved case.

In the month of March the transcripts clearly establish that the President was progressively told by Dean facts which were sufficient to put him on notice that something had been very wrong at the time of the Watergate matter, in terms of the White House relationship to the burglary. There is no question about the fact that on the 13th of March the President had some evidence, on the basis of what Dean told him about Strachan, to believe that at least one person in the White House know that the DNC wiretapping was going on.

Interestingly, neither Dean nor the President seemed to know whether Haldeman would know about that simply by virtue of Strachan's knowing about it.

Now, thing about that. Dean did not know, according to what he said on the 13th of March, 1973, whether Haldeman knew about the first break-in and then the wiretapping that went on for a few weeks until the second break-in.

If that is the kind of complicated fact situation that we have here—why, Dean, for heaven's sake, Dean was in the middle of the conspiracy, if anyone was. If anyone had an opportunity to know whether Haldeman knew about the break-in before it occurred, certainly Dean should have. But on the 13th of March, 1973, he didn't know, or said he didn't. That was a long time after the break-in. It was a lot of conversations with White House people, a lot of opportunities to learn the ins and outs of what had gone on in February and March and April and May and June of 1972, and none of those conversations, none of the snooping around he was doing for Ehrlichman or for his own purposes had yet given Dean the answer as to whether Haldeman knew.

We come to the events of the 16th of March through 21st and, of course, there is a tremendous volume of evidence, information, bearing upon all of that. I would offer you a proposition of law which I think is valid, and that is that it is not controlling and perhaps it is not even legally relevant to the President's criminal liability as a coconspirator whether the March 21st payment was ordered by him or not. It might come as a surprise to you that I would say that. The law of conspiracy is that if the President became a coconspirator as of a certain date, if you find as a fact that he entered the conspiracy because his knowledge was sufficient and his intent was to participate, then he became a coconspirator at the instant that he acted to manifest

his intent to participate, whether he did that by words or deeds. So that, and I say this purely hypothetically, if the President on the morning of the 21st of March had said, "Well, John, what you have told me is very interesting, and one thing is clear, I have certainly got to help you fellows cover this thing up," that would simplify our problem in terms of proof, for it would clearly show the President to have become a coconspirator. As of that instant he then would have become criminally liable, and it doesn't matter whether that last payment was ever made—not only when it was made, but whether it was made—because he would have already become a part of a criminal conspiracy. He would have ratified the prior acts of his coconspirators and become liable for them.

Now, true, if another substantive offense were to occur subsequent to the time that he entered the conspiracy, he would be separately liable for that substantive offensive, and, of course, we know that a payment was made on the 21st of March. I suggest to you that the evidence is very persuasive and there shouldn't be any remaining factual issue as to whether the payment was made on the 21st of March. And that payment, if you believe that it was with an intent to buy silence, would have itself been an obstruction of justice, and if the President had entered the conspiracy prior to that time, he would be then criminally liable for that substantive offense as well as criminally liable for being a conspirator.

Now, does what I have said mean that it is irrelevant to the purposes of the inquiry whether the President ordered and directed that payment to be made? The answer to that is, "no." It is very relevant, factually, and for purposes of the law of impeachment. It is relevant factually because obviously, if one believes that the President ordered the payment to be made and then if one were to further find that his intent in so doing was to obstruct justice, then one would certainly have established involvement in the conspiracy. It is very relevant in terms of that one avenue of proving Presidential involvement if the circumstances that were hypothesized in the indictment in *United States* v. *Mitchell* were proved to be correct. I think we all know what inferences the grand jury supposed would be drawn and what they appear to have drawn, that the President told Mitchell—excuse me—told Haldeman to have the payment made and that Haldeman then got the word to Mitchell, and Mitchell got the word to LaRue, and LaRue made the payment, and that is all nice and neat and would settle the question of whether the President had performed an overt act, an overt act in the sense of conduct, affirmative action, to join the conspiracy.

But the theory that appears to form the basis of at least that portion of count No. 1 of the Mitchell indictment is absolutely not borne out by the evidence before this committee. All of the evidence that we received from the live witnesses, all of it, tends not only to raise doubt that the sequence of events was that way, but to disprove a sequence of events constituting the conveyance of a direct order from the President to Haldeman to Mitchell to LaRue, and then the payment was made. And that is just the fact of the matter, ladies and gentlemen. To suggest otherwise would be to insist upon believing something that is not in the evidence. And this committee as a prudent prosecutor simply cannot recommend to the House of Representatives that the

House places its enormous prestige behind a prosecution in the Senate founded upon that demonstrably false premise.

It would appear that the final payment to Hunt had been set in motion prior to the time that the President and Dean talked on the morning of March 21, and I think once you come to believe that, then it really doesn't matter so much who talked with whom, at which time of day, or whether it was in the evening or in the morning, or whether it was in person or by telephone, or what have you.

You have to focus your attention on the question, Did the President, by his words, by what he said or did in some way associate himself with the conspiracy? not, Did he order the payment to be made? because it is clear that he did not do the latter. I would suggest, as an aside—and I hope you forgive me for this—that, frankly, I had never given any credence at all to the allegations that perhaps the political composition of Special Prosecutor's office was such as to be unconsciously prejudicial to the President, until I read the presentment sent to this committee by the grand jury and the evidence sent to this committee in support of some of the allegations in that presentment. There was not one bit of evidence sent to this committee by the Watergate grand jury that sustained the allegation that LaRue talked with Mitchell in the early afternoon following Dean's first conversation of the day with the President.

Ms. HOLTZMAN. Mr. Chairman, I think it is inappropriate for counsel to attack the Special Prosecutor's office as being politically motivated. I am not sure that that is a question before this committee and I would ask to withdraw that statement.

Mr. GARRISON. Ms. Holtzman, I would be happy to withdraw any such implication. What I was trying to say is not that they were politically motivated, but I believe people sometimes don't know their own motives.

Now, my point is that maybe LaRue talked with Mitchell in the afternoon. The evidence we had before this committee flatly disproves that, but, hypothetically, maybe he did.

My point is that the evidence that the grand jury sent here didn't have a single word in it to support that, and I ask you to review every single line of it.

Focus then upon the content of the conversation. What did the President say? And there you then have to bring into play those elements of conspiracy, knowledge, and intent. Knowledge has to be full knowledge, knowledge has to be knowledge and not wondering. It has to be knowing, not suspecting.

And I ask you whether you think that the statement of the President's knowledge of the participants, the purposes and the general contours of the conspiracy was in existence as a result of that conversation.

Now, it is easy enough to say, well, of course it was, because Dean told him thus and so. But, who was Dean, and then who was Haldeman? Dean is telling the President a lot of things that obviously need further investigation.

This committee, the Senate Watergate Committee, the Special Prosecutor's office and, it seems, at least 2 million newsmen have spent the better part of a-year-and-a-half trying to figure out what happened in the Watergate affair. I would ask you ladies and gentlemen of the com-

mittee to consider for a moment whether what the President had been told by Dean on either the 13th or the 21st of March, and even going on through the month of April 1973, formed a sufficient basis for belief as to create in the mind of the President the state that you and I would both agree is called knowledge.

Second, the question of whether the President manifested an intent to participate in the conspiracy, if he knew of its existence. The evidence has to be viewed, according to the case law, as if the President were a person in authority, and the test for manifesting an intent is somewhat relaxed from that applicable to a private individual, and I think a reasonable legal argument can be made for the proposition that in his capacity as Chief Executive and "boss" of the White House staff——

Mr. McCLORY. Mr. Chairman, I note that the second bell has rung. Mr. Garrison, could you estimate how much longer you would require?

Mr. GARRISON. Oh, I think perhaps 15 minutes to cover the Watergate situation, and I would be perfectly at the will of the committee not to cover other matters, if that is your wish.

Mr. McCLORY. Mr. Chairman, I suggest that we either come back at the end of the quorum call or else reconvene at 1:30 for 15 minutes.

The CHAIRMAN. Well, unfortunately, we do have a matter that is of interest to the members of the Judiciary Committee that is on the floor immediately following the quorum call, and the committee is going to reconvene at 2 o'clock for a business meeting. So, we will determine at that time.

Mr. McCLORY. Could we come back at 1:30, I wonder, to hear Mr. Garrison?

The CHAIRMAN. We can do it afterwards. I think it would be better to wait until we have had that meeting.

Mr. McCLORY. That will be an open meeting?

The CHAIRMAN. That's correct.

Mr. McCLORY. OK.

The CHAIRMAN. I am sorry, Mr. Garrison.

Mr. GARRISON. Yes, sir.

The CHAIRMAN. But, we will try to get that time at some time after 2 o'clock.

Mr. GARRISON. Yes, sir.

[Whereupon, at 12:15 p.m., the meeting was recessed to reconvene subject to the call of the Chair.]

EVENING SESSION

The CHAIRMAN. The committee will please come to order.

Mr. Garrison will be recognized. Mr. Garrison.

Mr. GARRISON. Thank you, Mr. Chairman, ladies and gentlemen of the committee.

When we recessed the hearing at noontime, I had been discussing the question of the President's statements during his conversation with John Dean on the morning of March 21, in terms of whether what the President said that morning can reasonably be construed and found by you as a fact to constitute his joining the conspiracy. Words are capable of being overt acts or conduct sufficient to satisfy the legal requirement of affirmative action, when accompanied by the requisite the intent

and knowledge. I think that I have discussed the question of what "knowledge" would mean, in the context of a matter being brought to the President's attention with some possibility of doubt in his mind as to the accuracy of all or part of what he was being told.

I would like to focus now, though, on the question of whether the President did manifest approval or acquiescence in the making of the March 21st payment. I distinguish this point from the one I made previously, which was whether the President actually authorized and directed the payment to be made. I am satisfied that, as a matter of law, if the President knew that the payment was going to be made, and knew its purpose, and if its purpose was to serve as what we commonly call "hush money," and if he, upon knowing and understanding it, then acquiesced in the payment's going forward, a reasonable legal argument can be made that because of his position as Chief Executive vis-a-vis government officials, or perhaps even simply as an employer vis-a-vis employees, he was in a position and had a duty to stop the payment from being made and, therefore, could be held criminally liable for failing to do so.

However, as a question of fact, I would suggest to you that it is far from clear that the President actually did acquiesce in the payment of money to Howard Hunt which apparently occurred some time later that day. And I would suggest for your consideration that, in determining what the state of the matter was at the conclusion of the conversation, it is relevant to consider not only what the transcript itself shows, but also what the apparent impression or understanding of the participants in the conversation was after the conversation ended.

Now for purposes of examining the transcript itself, first I would cite you to page 121 of our publication:

> "Transcripts of Eight Recorded Presidential Conversations", and at the bottom of that page I would suggest that you focus your attention on the word "it" in the sentence," Well for Christ's sakes get it in a, in a way that, uh—who's, who's going to talk to him?"

My reason for doing so is that I think it is a reasonable interpretation of the evidence that the antecedent of the word "it" is "signal" which appears a few lines up. Mr. Dean says, "I think he ought to be given some signal, anyway, to, to——

> The PRESIDENT. Yes.
> DEAN. Yeah, you know.
> The PRESIDENT. Well, for Christ's sakes get it * * *

Now, there is obviously another possible interpretation of that very same language, which would be that the antecedent is the words "hundred and twenty or whatever it is," several lines up where the President says, "That's why your, for your immediate thing you've got no choice with Hunt but the hundred and twenty or whatever it is."

I point this out because in determining as a question of fact whether, all things considered, the President associated himself with the conspiracy, you may consider it relevant to know whether the President meant to get Hunt a "signal," as a holding action, or whether he meant to get him the money. It's obvious, I think, that the language in this transcript by the President is susceptible to an interpretation that the

President considered the possibility of *some* action being taken on Hunt's demands as a matter of "buying time."

Mr. RANGEL. Mr. Chairman, point of clarification.

Counsel, tell me what Mr. Dean's response is to the President after the word signal is used.

Mr. GARRISON. His response is, "Well, Colson doesn't have any money though."

Mr. RANGEL. Thank you.

Mr. FLOWERS. What page is that?

Mr. HOGAN. Mr. Chairman, I thought he was not to be interrupted.

Mr. RANGEL. I didn't understand whether I was using the same transcript.

Mr. GARRISON. Mr. Chairman, I have no objection at all to being interrupted for questions like that, because that gives me the opportunity, for example, to point out the word "though." The word "though" seems to suggest a consideration in addition to money: you may get Mr. Colson to talk with him, but Colson doesn't have any money.

Mr. RANGEL. That clears it up. Thank you.

Mr. GARRISON. I would point out to the committee that on page 125 of the "Transcripts of Eight Recorded Presidential Conversations," a little below the middle of the page, the President says:

"That's right. Try to look around the track. We have no choice on Hunt but to try to keep him——

Mr. DEAN. Right now, we have no choice.

The PRESIDENT. But, my point is, do you ever have any choice on Hunt? That's the point.

DEAN. [Sighs.]

The PRESIDENT. No matter what we do here now, John——

DEAN. Well, if we——

The PRESIDENT. Hunt eventually, if he isn't going to get commuted and so forth, he's going to blow the whistle.

I believe the members of the committee will find evidence in the transcript from which they may infer that the President had rejected the granting of clemency as a realistic option, for whatever motive. If that is the case, the passage to which I have directed your attention would indicate that the President at this moment is stating that, since the indispensable prerequisite for keeping Hunt silent is incapable of being met, the entire effort to keep Hunt silent is necessarily doomed.

I would further direct your attention to page 129, to the very last paragraph of that page near the end of this conversation, where the President says, "All right. Fine. And uh, my point is that, uh, we can, uh, you may well come—I think it is good, frankly, to consider these various options. And then, once you, once you decide on the plan—" and so forth. I direct to your attention this language because, in light of the previous portion of the transcript that I pointed out, it supplies additional evidence of the possibility that the President had not made a decision with respect to what he was going to do at all, and it would seem that at this point in the transcript, had the President himself understood that what he had said would result in Howard Hunt's being paid, he may have referred to the state of the matter at that time differently.

I would also say to the members of the committee, in all fairness, that I do not in any way suggest that the only way in which the Presi-

dent could have by language associated himself with the conspiracy that morning would be by reference to money. The question would be whether he in any way manifested, through his words, knowledge and intent to participate, but the reason for my focusing upon the question of money is obvious, since a payment was in fact subsequently made, and there has been a great deal of controversy within the committee over whether he approved it, on the one hand, or acquiesced in it, on the other. And I would suggest that the language from the transcript itself indicates that the President may not even have acquiesced in the payment's being made.

Now, turning to the question of impressions formed by participants in the conversation, of course what they said during the conversation is relevant. But, at this point, what was said after the conversation also becomes relevant.

Evidence bearing upon this question is found at pages 1032 to 1034 of the GPO edition of the edited White House transcripts. This is a conversation, and I am now at page 1032 of the big blue book, the GPO edition of the edited White House transcripts.

The CHAIRMAN. What conversation is that, Mr. Garrison?

Mr. GARRISON. This is a conversation that took place on the afternoon of April 17, 1973, in a meeting among the President, Mr. Haldeman, Mr. Ehrlichman and Mr. Ziegler.

The CHAIRMAN. Is that not one of the conversations that we requested and subpenaed?

Mr. GARRISON. It is, Mr. Chairman. At page 1032:

HALDEMAN. Told you about it, told me about it. I was in here when he told you.

PRESIDENT. Good. What did we say? Remember he said, "How much is it going to cost to keep these, these guys" (unintelligible). I just shook my head. Then we got into the question——

HALDEMAN. If there's blackmail here, then we're into a thing that's just ridiculous.

The PRESIDENT. He raised the point—

HALDEMAN. (Unintelligible) but you can't say it's a million dollars. It may be $10 million. And that we ought not to be in this——

The PRESIDENT. That's right. That's right.

HALDEMAN. We left it—that—we can't do anything about it anyway. We don't have any money, and it isn't a question to be directed here. This is something relates to Mitchell's problem. Ehrlichman has no problem with this thing with Hunt. And Ehrlichman said, "(expletive removed) if you're going to get into blackmail, to hell with it."

The PRESIDENT. Good (unintelligible). Thank God you were in there when it happened. But you remember the conversation?

HALDEMAN. Yes, Sir.

The PRESIDENT. I didn't tell him to go get the money did I?

HALDEMAN. No.

The PRESIDENT. You didn't either did you?

HALDEMAN. Absolutely not. I said you got to talk to Mitchell. This is something you've got to work out with Mitchell, not here—there's nothing we can do about it here.

Likewise, on page 1034:

HALDEMAN. You explored in that conversation the possibility of whether such kinds of money could be raised. You said, "Well, we ought to be able to raise—"

The PRESIDENT. That's right.

HALDEMAN. "How much money is involved?" and he said, "Well it could be a million dollars". You said, "That's ridiculous. You can't say a million. Maybe you say a million, it may be 2 or 10, and 11".

The PRESIDENT. But then we got into the blackmail.

HALDEMAN. You said, "Once you start down the path with blackmail it's constant escalation".

The PRESIDENT. Yep. That's my only conversation with regard to that.

HALDEMAN. They could jump and then say, "Yes, well that was morally wrong. What you should have said is that blackmail is wrong not that it's too costly."

Now, I realize that there is a possibility—although I would suggest that essentially it would be speculation rather than something that is actually proved by the evidence—a possibility that the President, in conversations subsequent to the 21st of March, rehearsed with people accounts of what had previously been said. I want to be clearly understood on this: I am suggesting merely a possibility. I do not say the evidence clearly shows this, but I want for the moment just to assume that the President was rehearsing and was talking, so to speak, "for the record," and I would suggest to you that if that were the case, and if the President were aware that he had in fact left an impression with Dean that he felt the money should be paid, it would be the most natural thing for the President to "make his record" by explaining away why he had appeared to acquiesce.

On page 1034 of the GPO transcripts, where the President and Mr. Haldeman appear to agree that the President probably had made a mistake in suggesting by his language on the 21st only that "hush money" would cost too much. They agreed that the President should have said it was wrong to raise money to pay defendants to remain silent.

Now, I think that may be considered to have significance in this respect: once again, it is susceptible of an interpretation that the recollection that the President and Mr. Haldeman had of the March 21 conversation which bothered them and which, if they were speaking "for the record" on April 17, they would feel an impulse to correct or explain away, appears to be a recollection of the President's having given the wrong reason for disapproving, and not a recollection of his having approved the payment to Hunt.

If the President and Mr. Haldeman were indeed "making a record," and if they were in that process trying to explain away the damaging things that the President felt he had said, then they certainly didn't cover the subject well if they felt that the really damaging thing was that the President had approved the payment or acquiesced in it. I think the committee is entitled to make a distinction between approval failing to give the right reason for disapproval, and the committee can give that difference such weight as it sees fit.

You should consider also the possibility that the President and Mr. Haldeman were not "making a record." If they were not "making a record," which is, of course, possible since the existence of a White House tape recording system was not widely known at that time and may very well have not been anticipated to be known in the future, then, of course, what I have said would still apply, but with greater force because then their motives would be less suspect, and the recollections that they appear to have had could be considered as more probably genuine.

Next I would like to cite you to essentially the entire testimony of John Dean before the Senate Select Committee in June of 1973. This was 3 months after the March 21 conversation, rather than 15 months afterward, which was the case when Mr. Dean testified before this committee recently.

Mr. Dean told the Senate Select Committee, I think you will agree, in essence that it was the Hunt demand which precipitated his going to the President to tell him all, that the thing in effect had just gotten out of hand, that he couldn't wait any longer. He and Mr. Moore talked about it, you will recall, on the 20th—there is some discrepancy as to who suggested to whom that Dean tell the President all but, in any event, clearly it was the Hunt demand that precipitated Mr. Dean's going in to the President on the 21st of March and telling him more than he appears ever to have told him before.

Now Mr. Dean in his SSC testimony did say that some things had been discussed on March 13 concerning money, and some things on the 21st, and I would ask you to consider that whether they were discussed on 2 days or on 1 would probably be irrelevant to this limited point: if that Hunt demand was so alarming to Dean that he was moved to go in to try to make sure that the President knew all he needed to know in order to be able to handle this acute situation, do you believe that Dean would have left that meeting without knowing what the upshot of the conversation was with respect to that payment? Do you believe that Mr. Dean would not have told the Senate Select Committee in June of 1973, if, in fact, he felt after the meeting that the President had either acquiesced in a payment that the President knew was to be made by someone else or had directed that such a payment be made? But Mr. Dean at no point in his testimony before the SSC ever suggested that the President knew that a payment was to be made and acquiesced in it, or ordered a payment to be made.

Dean's testimony on that question, as a matter of fact, is typified at volume 4 of the SSC hearings, page 1423, when he referred to March 13 and said that on that date they discussed raising a million dollars. He said "The money matter was left very much hanging at that meeting. Nothing was resolved." And I assure you if you read Mr. Dean's testimony before the SSC, every word, you will not find a bit of evidence that would suggest that as of last year Mr. Dean had formed any impression at all that the President knew that the last payment was about to be made and acquiesced in it.

I would next direct your attention to the transcript of the conversation on the late afternoon of March 21 which is found on page 133 of your "Transcripts of Eight Recorded Presidential Conversations." There the President says:

> So then now—so the point we have to, the bridge you have to cut, uh, cross, I understand, is whether uh, we, uh, what you do about, uh his present demand. Now what, what, uh, what (unintelligible) about that?"
>
> DEAN. Well, apparently Mitchell and, and, uh, uh.
>
> UNIDENTIFIED. LaRue.
>
> DEAN. LaRue are now aware of it, so they know what he is feeling.
>
> The PRESIDENT. True. (Unintelligible), do something.
>
> DEAN. I, I've, I've not talked with either. I think they're in a position to do something, though.

Now, let us focus upon Dean's statement, "I, I've not talked with either." This is taking place the afternoon of the day in which Mr. Dean told the President that he had talked with John Mitchell the night before, using code words to keep Mrs. Mitchell possibly from overhearing and understanding what they were saying. It is clear that if Dean tells the President that afternoon that he has not talked with either of them, LaRue and Mitchell, that means one of two things:

either he has not in fact talked with either of them since the morning meeting, or he is withholding the fact that he talked with one of them since the morning. I think those are the only two choices.

If Dean had not talked with either Mitchell or LaRue since the morning conversation, then, since he did not tell the President that morning that he had already talked with LaRue, John Dean in going in supposedly to help the President straighten this matter out actually withheld from him probably the most critical fact he could have revealed with respect to the payment situation. LaRue had always been the money man, but Dean withheld from the President the fact that he, Dean, had already had all the conversations that one would ever need to have in order to set the last payment in motion. Dean didn't tell the President that. He sat there through the whole conversation in the morning, going over options, commiserating, but withholding a cardinal fact about the state of the matter at that moment. Even at the time when the President was supposedly being told by his counsel the truth about the kind of situation that had developed in recent months, even at that moment the President was poorly, poorly served by his counsel.

The only other alternative is that, when Dean said in the afternoon that he hadn't talked with either Mitchell or LaRue, he was lying. Frankly, the evidence would not support that inference, because we have no evidence that Dean had talked with either Mitchell or LaRue since his morning conversation with the President.

I would suggest to the members of the committee that, even on the morning of March 21, 1973, Dean did not really "come clean" with the President, did not tell him what was really going on. He did not tell him what he had already said to LaRue, and you will recall that, in essence, through his conversations with both Mitchell and LaRue, Dean had left it up to the two of them to make arrangements to have the payment made to Hunt.

Why wouldn't Dean tell the President that? Well, I suggest the answer that Mr. Dean was never fully candid with the President about either Dean's own role in the matter or what others were doing. In effect, Mr. Dean went in there that morning and talked with the President as if all of these things were up in the air awaiting the President's decision, and so forth, and didn't tell him that he, Dean, had really already taken care of getting the matter handled.

If the members feel, nevertheless, that the evidence as to the President's conversations on the 21st of March or on any other day in March or April 1973, satisfies them that the President had sufficient knowledge and understanding and manifested an intent to conspire to obstruct justice, then you would still have to consider the question of the significance of his conduct. This relates to the point I made this morning about the exercise of political judgment, with a capital "P" by the House and by the Senate. Whether or not it would be legally relevant to the issue of guilt or innocence in the case of an ordinary criminal conspiracy prosecution, the time when the President entered the conspiracy, if ever, and the degree of his activity in it, if any, is nevertheless relevant to these proceedings. There has never been a better established rule of social regulation than that the precise nature of one's conduct determines the precise punishment or sanction for it. If any individual were charged with criminal conspiracy

in a court of law, the trier of fact and the sentencing judge would have to consider fully at what point the person became a member of the conspiracy, what his role then was, what were all of the circumstances pertaining to his becoming a member at that time, and would in essence consider all factors in aggravation and mitigation before imposing sentence. I think you would find that the evidence before you is such as to raise grave doubts—and I don't want to use any term of art now to describe the state of the evidence—but I think you would find a great deal of uncertainty, ambiguity in the President's actions, and also in his words from March 21, 1973, on which would raise questions as to whether he ever knowingly joined the conspiracy at all with an intent to frustrate the purposes of the law.

Further, even if you were to find that on the 21st of March or thereafter the President knew what he was doing with respect to "buying time" or what have you, this is precisely the kind of difference in degree of culpability, as contrasted with the allegation that he ran and directed the conspiracy from the 17th of June, 1972, forward, to warrant the House, in the exercise of its political judgment in this case, to conclude that the only sanction available in the impeachment process—removal—should not be imposed.

Mr. SEIBERLING. Mr. Chairman, I wonder if we might interrupt just to ask Mr. Garrison on page 133, what he considers the significance of the word "true," the President spoke toward the bottom of the page, after Dean said Mitchell and LaRue are apparently aware of.

Mr. HOGAN. Mr. Chairman, I thought we were going to let him conclude before questions were asked.

Mr. SEIBERLING. Well, he said he welcomes them.

Mr. HOGAN. Well, yes, but I don't welcome them. I want to hear him and leave.

The CHAIRMAN. Let Mr. Garrison conclude.

Mr. GARRISON. My point was that where the only sanction available to the Congress the premise is removal from office, it would seem entirely consistent with the purposes of the impeachment process, and the role of the House in that process, to consider whether there is a difference in result, depending upon when, how, and for what purpose the President combined with others for even a momentary delay, or "buying time" as it appears in the transcript, in the expedition of getting the truth of the Watergate case out. Those are judgments which it is not only proper, but which I suggested this morning are constitutionally necessary for the House to make.

There are only two other points I wish to make. One is that there are a couple of matters which have arisen during presentation of the evidence which I think are suggestive of the kind of problem that could be encountered in the Senate if cases built largely on inferences and on second- and third-hand hearsay are prosecuted by House Members without advance realization of what a closer scrutiny of the evidence would reveal.

The first example concerns the so-called "missing" tape of John Dean's April 15, 1973, conversation with the President. Dean's SSC testimony suggested that he thought the President might have been recording him on that occasion. That was the conversation, according

to Dean, in which the President spoke in a low voice and said, in effect, "I guess I shouldn't have talked about clemency with Colson."

I submit that the weight of all the evidence shows that there probably never was a tape of that conversation on April 15, just as the White House has contended, and that the entire controversy over whether a tape of that conversation once existed is a result of simple mistakes. There was a common source of error which led to many months' searching for a tape which never existed, and the common source of the error was either the President or Henry Petersen, a man whose motives are not in any way being impugned here. I am suggesting merely a mistake. Henry Petersen testified here and before the Senate Select Committee, and he first told it to the Special Prosecutor, that he talked with the President twice on April 18, 1973, and that in the first of those conversations the President asked him if it was true that Dean had been granted immunity and that Petersen had said "no." According to Petersen, the President had said, "Well, Dean told me he had immunity, and I have it on tape," or words to what effect.

Henry Petersen told that to the Special Prosecutor on May 29, 1973, before he testified publicly during the SSC hearings, and on both occasions Petersen said that the President had been referring to a conversation he had had with Dean on the night of April 15, 1973.

Now, ladies and gentlemen of the committee, in order to find out whether Peterson's reconstruction is plausible, read the transcripts of Dean's two conversations with the President on April 16, 1973, which are printed in our "Transcripts of Eight Recorded Presidential Conversations," one in the morning and one in the afternoon. Read them from beginning to end and you will see that, in context, it is crystal clear that Dean was at that time still negotiating with the prosecutors. He was in no way representing to the President that he had been immunized. Therefore, it makes no sense at all for the President actually to have claimed to Henry Petersen on April 18 that Dean had told him on the 15th that he had been immunized. Petersen and the President had talked several times since the 15th, including once by telephone about an hour and a half after the conversation with Dean had ended, but the President said nothing to Petersen then about a Dean claim of immunity.

I don't know whether the mistake was Petersen's or whether it was the President's. But clearly April 15 would be the wrong date for Dean to have claimed to have been immunized.

Now, why do I say a common source of error? You recall that Dean himself testified before the SSC that he had the impression that when he talked with the President on the evening of April 15 that the conversation was being recorded. That seems so nice and neat and consistent, because the President supposedly told Petersen that he had a tape of that conversation, so Dean thinks he was being recorded. Henry Petersen was still the common source of error, because on April 18, well in advance of Dean's testimony before the Senate select committee, Henry Petersen called Earl Silbert and told Silbert to check with Charles Shaffer, Dean's attorney, to find out whether there was some misunderstanding about Dean's status as to immunity, since the President was saying he had a tape of Dean telling the President that he had been immunized.

So as of April 18, April 18, Dean's attorney would have known that the President was claiming to have a tape of Dean saying he had been immunized. Moreover, since Dean was cooperating with the Special Prosecutor, any time after May 29, 1973, he very likely would have learned from that source what Petersen had told them on the same subject.

The second point, if the clerk could pass these out—is there a clerk?

The CHAIRMAN. Mr. Garrison, we are going to have a vote in a few minutes.

Mr. GARRISON. Yes, sir. It won't be necessary to spend much time on this.

What I am now distributing to members of the committee, and this will eventually be published as part of the minority report's Watergate section, is, I believe, the answer to the controversy over whether the President has withheld from this committee relevant portions of his conversation with John Dean on March 17, 1973.

[The document referred to above follows:]

COMPARISON OF EXCERPTS FROM JUNE 4, 1973, HOUSE JUDICIARY COMMITTEE TRANSCRIPTS AND MARCH 21 AND 22, 1973, HOUSE JUDICIARY COMMITTEE TRANSCRIPTS

| | |
|---|---|
| | *June 4* |
| Book IX, 209 | PRESIDENT. And he said, "No one in the White House except possibly Strachan is involved with, or know about it." |
| | *March 21, a.m.* |
| HJCT, 86 | DEAN. "Gordon," I said, "first, I want to know of anybody in the White House was involved in this." And he said, "No, they weren't." |
| | *June 4* |
| BookBook IX, 209 | PRESIDENT. Magruder had pushed him without mercy. |
| | *March 21, a.m.* |
| HJCT, 86 | DEAN. And he said, "Well, I was pushed without mercy by Magruder to get in there . . ." |
| | *June 4* |
| Book IX, 209 | PRESIDENT. "Strachan may have pushed him." He says he (unintelligible) tickler and figured he was supposed to push him. |
| | *March 21, a.m.* |
| HJCT, 84 | DEAN. And through Strachan, uh, who was his tickler, uh, he started pushing them. |
| | *June 4* |
| Book IX, 208 | PRESIDENT. "Kleindienst wanted to turn Baker off (unintelligible) embarrass the FBI." |
| | *March 22* |
| HJCT, 105–155 | The is a general discussion of Kleindienst, Baker, and the FBI. |

NOTE.—Book IX, references are to HJC's Statement of Information; HJCT are to "Transcripts of Eight Recorded Presidential Conversations."

The White House supplied an edited transcript of the conversation on the 17th of March which included only a short excerpt pertaining to Dean's telling the President about the Dr. Fielding break-in. When we went through the evidence before the committee and came to the

transcript of the President's conversation on June 4, 1973, the point was made—and I suggest to the members of the committee it was perfectly legitimate to make the point, and it was done in good faith—that when the President on the 4th of June was reviewing his notes and was relating to Haig and Ziegler what he had heard when he was listening to some of his tapes, his notes seem to show that on March 17 Dean told him a number of things about the Watergate matter.

The sheet of paper that we have just distributed compares quotations that the President on June 4 relates to Ziegler and attributes to the March 17 conversation with quotations from our own transcript of the March 21 and 22 conversations.

Mr. RAILSBACK. Mr. Chairman——

The CHAIRMAN. Mr. Railsback.

Mr. RAILSBACK. Mr. Chairman, I just want to say to the gentleman that I agree with him and you and I have discussed about this before.

Mr. GARRISON. Yes, sir.

Mr. RAILSBACK. I do find it strange that Mr. St. Clair didn't tell us that, though.

Mr. GARRISON. That is, I am sure, for all of us not the only strange thing that has happened this year, in this inquiry. I agree with the Congressman, but I would have to say simply that I give you the page citations for you to make your own judgment as to whether, in fact, the President was not simply mistaken as to which date the quoted words were actually uttered. Most of them come from the 21st of March, perhaps taken from Haldeman's notes of his having previously listened to that tape, and one of them comes from the 22d of March. So you have a picture of the President with a note pad, scribbling all over it, going through his notes with Mr. Ziegler and having certain statements that were actually made on March 21 or 22 mistakenly related to Ziegler having been made on March 17 instead. It is for you to read those passages and conclude whether that inference is correct or incorrect.

Mr. SARBANES. But, did we seek the conversation of March 17?

Mr. GARRISON. Yes, sir, and the President has said that he supplied us with the only relevant portion of it.

Mr. SARBANES. That was a conversation as I recall that lasted for some time and we were given just a few pages, is that correct?

Mr. GARRISON. Yes, sir. And I think the adverse inference suggested was that if, in fact, these June 4 quotes had been taken off the tape of March 17, the President had withheld from this committee and from the public Watergate material which was highly relevant. I respectfully suggest to the Congressman that it appears that the President simply made a mistake on the 4th of June as to on which date those quotes originated. This is another instance of a common course of error, because J. Fred Buzhardt submitted to the Senate select committee in June of 1973 a memorandum of conversations between the President and Dean in which Buzhardt attributed to March 17 some conversation about Watergate, you will recall. Of course he did. The President apparently gave him that information. The President——

Ms. HOLTZMAN. Mr. Chairman——

Mr. GARRISON. Pardon?

Ms. HOLTZMAN. Excuse me. How do you know that Mr. Buzhardt's statement was made on the basis of the President's statements, as opposed to Mr. Buzhardt's listening to the tapes himself?

Mr. GARRISON. Ms. Holtzman, that is clearly a matter of inference from all the known facts. I am not suggesting—if I could have shown you the page, I certainly would have done that—but I am suggesting as a matter of argument that if the President's own notes on the 4th of June were erroneous as to the date on which these matters were discussed, it is reasonable from the evidence to infer that that was the cause of Mr. Buzhardt's error.

The CHAIRMAN. We will come back immediately after this vote and have you conclude and then Mr. Jenner has 15 minutes.

[Recess.]

The CHAIRMAN. Will the committee members please take their places and we will resume.

Mr. Garrison has his concluding remarks to make, and I think he has some corrections.

Mr. GARRISON. Mr. Chairman, and ladies and gentlemen of the committee, in connection with the question I was discussing just before the recess I would like to cite you, to pages 182 and 183, book IX, part 1 of the committee's statement of information, where the question was asked by Steve Bull as to which tapes the President wanted to hear on that date, June 4, 1973, and the President told Mr. Bull that he didn't need the tape of March 21 because he had it.

The quote is: "You can skip the April 15th." And Bull says: "And March 21st?" And the President says, "March 21st, that's right. I have those."

It should be pointed out to you that Mr. Haldeman had checked out the March 21 morning tape on the 25th and 26th of April, and had himself made notes on the content of those conversations, which the President, one infers, had available to him on the 4th of June. That may be why the President didn't need to listen to the March 21 tape himself on June 4.

One correction in my remarks of this morning: When I was discussing the problems arising from efforts from the majority and minority to harmonize their views in collaborating on joint staff projects, I used the word "dilute" in reference to legal memoranda, and I want to explain what I meant by that.

In an joint project, the prevailing view among the majority members of the staff may be that a certain proposition is true. The prevailing view among the minority members of the staff may be that the same proposition is untrue. The tendency is to attempt to split it down the middle, or perhaps a little bit closer to the majority viewpoint because of the weight in the staff, so when I spoke of "dilution" of the majority position, I did not mean to suggest that this would be done as part of any attempt by the minority to distort the facts or to distort propositions of law, but merely that the honest view of most minority staff members might be that a particular preposition advanced by the majority was not tenable.

I would like to conclude by referring you to a statement of the President contained in the June 4th transcript when he described his position while being confronted with these various Dean revelations in March of 1973. Starting on page 227, book IX—and this is our

June 4th transcript—book IX, part 1, at the bottom of page 227, the President said:

Don't you think it's interesting though to run through this. Really the God-damned record is not bad, is it?

ZIEGLER. There is no—I am not—(unintelligible) Watergates makes me feel very good.

And then at the top of page 228:

The PRESIDENT. Well—

ZIEGLER. Not that I—

The PRESIDENT. It's not comfortable for me because I was sitting there like a dumb turkey.

I would submit to the members of the committee that if you believe that when the President made the statement on the 4th of June he was not merely speaking "for the record," he was not merely rehearsing for ulterior motive, but that it was an accurate reflection of his state of mind regarding the situation which had confronted him 3 months earlier, and if the members of the committee further believe that the evidence is insufficient to show that before the month of March the President really had been involved in the Watergate coverup conspiracy, then you may well want to consider the implications of that, in terms of President culpability in this matter. If the President was really sitting there "like a dumb turkey" while all around him his staff was engaged in activities that subsequently he learned were ones that he and you and I would not consider appropriate for White House employees, whether or not they were criminal, you might very well consider that fact to be of critical importance in determining whether the President should be impeached for his handling of the Watergate matter.

I appreciate very much the opportunity that the chairman has given me to present these views. I only want to say that it has been my feeling throughout this inquiry that every member of this committee is exactly as interested in the truth of this matter as I am. I accord that to every member of the majority as well as to every member of the minority. I have considered it a privilege to work for each of you, and I trust that you will consider this evidence in the same spirit in which I do, which is only to arrive at the whole truth of the matter.

Thank you, Mr. Chairman.

Mr. RANGEL. Mr. Chairman?

The CHAIRMAN. Thank you, Mr. Garrison.

Mr. Rangel.

Mr. RANGEL. You use the word I and we and now and then you were talking about the minority views, and quite frankly I have been pleased that those words have not been used too often either by members or staff. And most of the publicity has surrounded your selection of making a presentation, but since it is stated on the record that you were talking about the minority views, is this to say that with the exception of Mr. Jenner that all of the other lawyers that are registered Republicans share your view? How do you explain who on your staff your views represent?

Mr. GARRISON. Well, Mr. Rangel, I think the answer to that question is the same as it is in the case of any enterprise in which there are a large number of people participating. There is always at some point

a spokesman, and it is my understanding that the minority members of this committee directed me to prepare this statement of views.

Mr. RANGEL. I see. Now, I think you have cleared it up. I think what you said had to be said, but when you talk about the minority you are talking about the members of the committee and not the staff members who couldn't possibly be labeled as minority staff members?

Mr. GARRISON. I am speaking, Congressman, exactly the way that any counsel speaks when he is asserting a viewpoint on behalf of his clients.

Mr. RANGEL. I think you have cleared it up.

Mr. MCCLORY. Mr. Chairman?

The CHAIRMAN. Mr. McClory.

Mr. MCCLORY. Mr. Chairman, I am not going to ask you any questions. I merely want to state that in my opinion, Mr. Garrison, you have made a major contribution to our deliberations here, and I want to say this on behalf of the minority, the others, I think there are 14 minority counsel, 14 lawyers who serve on the minority staff, and I have had the opportunity to be in contact with all or most of them, and I know they are highly dedicated, capable young men who have endeavored to contribute to this entire proceeding in helping us to arrive at the truth.

And I did participate with the other minority members in designating and requesting that you present this in our behalf, and I think it has been a very important contribution, and I thank you.

Mr. GARRISON. Thank you, Sir.

Mr. DENNIS. Mr. Chairman?

The CHAIRMAN. Mr. Dennis.

Mr. DENNIS. I would like to associate myself with the remarks of Mr. McClory and say that in my judgment the committee is indebted to Mr. Garrison and to these other young gentlemen here for the service and for the statement of a position which, in my judgment, very badly needed to be stated in order to help us arrive at a proper and fair solution. And I think we are all indebted to him for the work, and these other men also, and I would like to make that for the record.

The CHAIRMAN. The committee, prior to committing Mr. Garrison to make his presentation, was scheduled to hear from Mr. Jenner. But Mr. Jenner at that time deferred, and I have since talked to Mr. Jenner, and Mr. Jenner has stated that in light of what has transpired, all he would require is some 15 minutes, so that he may make a presentation to the committee.

Mr. SANDMAN. Mr. Chairman, point of inquiry, please. In view of what has happened, and since this now has become an adversary proceeding, since Mr. Doar has presented the entire case against the President, I am wondering what Mr. Jenner's position is here today. As one member of the minority, he certainly isn't representing me. I don't know what members of the minority he is representing. He has already agreed with everything that Mr. Doar has said, and I think in summation it is only fair that we shouldn't hit the poor old Sam before and after. So, the question is what is his position today?

Mr. MCCLORY. Would the gentleman yield?

Mr. SANDMAN. I will be happy to.

Mr. MCCLORY. I thank the gentleman for yielding. I have a strong feeling that the problem with which the minority is struggling with at

the present time is one that we should try to resolve in camera, may I say, and not here at the——

Mr. SANDMAN. I would suggest, Mr. Chairman, we resolve this here. I mean, this man was supposed to be the attorney for the minority. He has been anything except the attorney for the minority. He has already come out——

Mr. KASTENMEIER. Regular order.

The CHAIRMAN. I regret to state that this is a matter that the Republicans or the minority might want to resolve.

Mr. SANDMAN. What is his position? Who is he representing today?

The CHAIRMAN. Well, insofar as the Chair knows, and the committee knows, there has never been any other official designation of Mr. Jenner other than that he represents this committee as its minority counsel, and the minority counsel was accorded the privilege of making a presentation. He deferred, very, very kindly and generously until Mr. Garrison, being whom he then referred to as the junior member, and I thought it was that kind of a deferential kind of courtesy which Mr. Jenner is very capable of, and I applaud it for him, and Mr. Jenner will now be heard.

Mr. MCCLORY. Well, Mr. Chairman, I would like to correct you in this respect, and that is that the unanimous action of the minority members resulted in the request that Mr. Garrison make the presentation on behalf of the minority, and he has made the presentation for the minority. I don't know what contribution Mr. Jenner is going to make. He can make whatever presentation you authorize him to make. But, the minority presentation has been made substantially by Mr. Garrison.

Mr. COHEN. Mr. Chairman?

The CHAIRMAN. I don't know what you refer to him as, but we will hear from Mr. Jenner. Mr. Jenner is, and no one has advised me to the contrary, Mr. Jenner was officially carried and is officially carried until this time and however you as the minority want to refer to him or treat him.

Mr. RAILSBACK. Mr. Chairman?

The CHAIRMAN. Nevertheless we will accord him I am sure the privilege that he is entitled to, and I would hope that the members on the minority side accord the man who has been their counsel for this time that kind of courtesy.

Mr. RAILSBACK. Mr. Chairman? Mr. Chairman?

The CHAIRMAN. Mr. Railsback.

Mr. RAILSBACK. Mr. Chairman, can I just say that I am certain that there are members on this side that want very much to hear Mr. Jenner. And as I recall, Mr. Jenner was slated to follow Mr. Doar. He has been working on the case from the very beginning. I think your characterization is absolutely correct, that he referred to give Mr. Garrison as much time as he wanted. Mr. Garrison has been on, so it is ridiculous to bring this up right now, and I want to hear Mr. Jenner, and there are others as well.

Mr. BROOKS. Regular order.

Mr. GARRISON. Mr. Chairman, if I might?

The CHAIRMAN. Mr. Garrison.

Mr. GARRISON. If I might, with all due respect to Mr. Sandman, say that I have very high personal regard for Mr. Jenner, and I for one would like to hear what he has to say.

The CHAIRMAN. Mr. Jenner. And might I say to the gentlemen that while it had been intended all along prior to the presentation that Mr. Jenner was going to make a longer presentation, but a while ago Mr. Jenner did tell me that in the light of what had occurred all he wanted was about 15 minutes to make a presentation. He did not specify other than that, and I think, Mr. Jenner, without saying any more. Mr. Jenner, we, I am pleased to hear you as a member of the committee as we recognized Mr. Garrison as a member of the staff, and everyone else here.

Please proceed.

Mr. JENNER. Mr. Chairman, and ladies and gentlemen. What I wanted to start out to say was that it has been a privilege to be counsel and to take part in this constitutional process and investigation. It is the greatest privilege I have had in my career, and I daresay the greatest privilege that any lawyer could ever have in his career, past, present, or future. And as I said when both you, Mr. Chairman, and Mr. Hutchinson questioned me in January of this year, when you probed as to whether I had any biases one way or the other, I responded that I had none, that I would bring to the committee my litigation experience and sense of professional responsibility to bear in an effort to bring the whole truth to this committee, to the House, and to the country. And that is what I have been doing.

I am also a human being. I have love for my country, and I have love for my Constitution, and love for my profession and my family. My Constitution and my country come first, and my profession next. And I regret to say that in my career my family has come third. Especially is all this so when the office of the Presidency of the United States is in any respect in jeopardy. And that is the manner and fashion in which I want to say to all of you that once the evidence was put together I did come as I said last Thursday, I believe it was, whatever day it was, I came to the professional judgment that I stated on that occasion.

I could have no other judgment in my heart, and I am not talking about the weight of the evidence now. I am talking about Bert Jenner. When I reached that conclusion then true to what I think I have been as a lawyer for over 43 years, I voiced it. It was not easy. Should I be put in the same situation again in the future, I would do it again. The truth is whole. It is not many sided. It is not political.

The Constitution, the Nation, and the people's government are before you as the elected representatives of the people. Thus, you are sitting as statesmen, not politicians. You have acted, in my judgment, as statesmen, to your credit and to the credit of your constituents who chose you.

Mr. Garrison this morning adverted to politicians in the small "p" sense. He asked that you consider the President's judgments in the summer and fall of 1972, as being made as a politician with a small "p." I must say to all of you, with candor and frankness, that I cannot conceive of the Chief Magistrate of the United States as a politician with a small "p." especially when dealing with matters involving the Constitution of the United States. I am sure Mr. Garrison didn't mean to suggest that you bring small "p" political considerations to your discharge of your responsibilities in this constitutional inquiry. The fact is that you are all statesmen. No consideration of constitutional prob-

lems of this magnitude is to be undertaken by anybody unless he or she is a statesman, not a politician with a big "P," not one with a little "p," but a true statesman. This is so because statesmen deal with the Constitution and with their country. That's what you are doing. I fully believe that everyone of you, everyone of you, is a statesman. You have evidenced that attitude throughout the weeks that have elapsed, or months that have elapsed, but especially the last 10 days, or the last 2 weeks, especially the last 2 weeks. I see you agonizing. I see you searching for the evidence, the truth, to enable you ultimately to reach sound judgments.

There has been much talk here about standard of proof, burden of proof, inferences to be drawn from the evidence. We lawyers know all about these principles. But, they have to be positioned and applied in the light of the function that you are undertaking. If you had had your choice at the outset as to whether to participate in these proceedings, I am sure you would have refused, many of you at least. Impeachment is awesome. It is awesome, but not in the sense that it is difficult. It is not that you don't want to face the agony of decision. It is awesome in the sense that it involves life and liberty and freedom of the 220 million people and citizens of this Nation, as well as those who will come after them. This is what makes it awesome. You will reach into your hearts when you vote to find what you think is absolutely the right decision. You will be thinking of your oath to preserve, protect, and defend the Constitution. That's the standard of proof you are going to apply. It isn't one you are going to find in law books. It is in your mind and your hearts.

Now, Mr. Garrison expressed some regret this morning. He said that in retrospect he was sorry that this committee had determined to have a staff that was a single and unified staff rather than the usual majority and minority groups. He felt perhaps it might have been better had there been a separate minority staff. I do want to say that I do not agree with that position. Had that been so, what has been brought to you would have been relatively impossible. These fine young men and women of the minority staff would have been second-class citizens. We as a band of 14 so-called minority lawyers could not have brought all of this before you in the way it has been brought, complete, unbiased, and as a whole, rather than partisan. It is clear that you have acted quite responsibly, in a constitutional sense, in doing what you did in that connection.

I would like to advert to a couple of evidentiary matters. Mr. Garrison quite properly this morning turned to the matter of whether you should draw adverse inferences from the failure of the President of the United States to respond to the subpenaes you have issued. And in this connection he remarked that inferences were weak evidence. I cannot agree. You all know, as good lawyers, that inferences have content in the light of their context. They must have a base and must grow out of that base. That is, you cannot draw an inference from nothing. The inference may be strong or it may be weak and of slight weight depending on the context from which it is drawn.

With respect to the failure of the President to supply the subpenaed tapes and documents the adverse inferences to be drawn flow from a strong background context.

I will refer to a few of those background contexts. Those to which I refer are illustrative only. There are others.

The first of them is the matter of our acquisition of an extra 15 minutes of the taped conversation of September 15. You will recall that there was a misadventure that took place when our tape people, pursuant to arrangement with Mr. St. Clair, went over to the White House to have taken off for them the tape of the September 15 conference between the President, Mr. Haldeman and Mr. Dean in the oval office. Unbeknown to us at the time, the Secret Service agents in taking off a tape for us from the original inadvertently started the recorder at a point 15 minutes ahead of the point of time that had been specified in the committee's subpena. The time point you had fixed in your subpena was the best that you could do based on the limited data you had which consisted of Presidential logs. What was revealed that was new? I call your attention to pages 1 and 2 of the transcripts of eight recorded presidential conversations which have been printed and published by the committee. Those 15 minutes cover all of page 1 and that part of page 2 running down to the bracket within which it is recited: "Dean enters room". You will find in that extra bit of taped conversation significant revelations which absent the Secret Service agents' misadventure, would not have reached this committee because of the President's refusal to supply all relevant taped conversations. In the middle of page 1 there are references to Dean working on the IRS to stimulate tax audits of persons listed on Colson's list of McGovern supporters.

There are other new matters—Watergate, coverup, concealment, containment. All these matters are pertinent and relevant to and needed by you in these proceedings.

What is more, they are adverse in content and support an inference that other taped conversations which the President has refused to produce would be similar in content.

Now secondly, the September 15 tape has another significance, and that is there are 17½ minutes of taped conversation that took place at the end of that meeting which we did not receive from the White House at the time the Secret Service agents took off the segment furnished us as I have related. Ultimately, and again by chance, a very small portion of the 17½ minutes was received through Judge Sirica by way of a transcript. That bit related to Watergate only. Thereafter, the limited portion relating to Watergate came to your attention when Judge Sirica examined that 17½ minutes pursuant to the mandate of the court of appeals to determine whether there was any Watergate material in that 17½ minutes. He reported in the affirmative. As a result, you had a very short page and one-half of excerpts from the last 17½ minutes confined, however, to Watergate. But, a material portion of your investigation deals with abuse of the IRS. What happened? Within the past 6 weeks, the Special Prosecutor petitioned Judge Sirica to reexamine the 17½ minutes to see if there was anything on abuse of the IRS in that 17½ minutes. And the good judge did so, and he reported in open court that there were conversations respecting abuse of the IRS that was relevant to the impeachment inquiry. Mr. St. Clair, in open court and for the President, refused to consent to your being supplied with Judge Sirica's transcript of the portion of the 17½ minutes relating to abuse of the IRS; furthermore,

Mr. St. Clair objected to delivery of that transcript to the Special Prosecutor and on behalf of the President appealed Judge Sirica's turnover order to the court of appeals where the matter is now pending. Judge Sirica also ruled, as I have reported to you, that the court of appeals mandate authorizing him to examine the tapes in camera was so limited that he was without authority to give the committee a copy of the transcript, much as he wished to do so.

Now, another pertinent event is the fact that by—again by happenstance, again by happenstance, we received from the Special Prosecutor by mistake on his part 160 odd pages or 180, of Mr. Ehrlichman's notes which had been filed with the court by the President in response to Mr. Ehrlichman's subpena. You had subpenaed the President to deliver a copy of those notes to the committee. We received from the President approximately the same number of pages but a large number of them were marked or blanked out. On the other hand, the 180-odd pages of the same notes received, by happenstance, from the Special Prosecutor contained far fewer blanked out pages. In the Special Prosecutor's copies, there is a host of material that is relevant and pertinent to these proceedings, and of a thrust adverse to the President's position, some of which has already been cited to you in the material presented to you last week, which is blanked out in the material received from the White House. Thus, here again, you have an example, a context, from which you may draw an adverse inference with respect to taped conversations and documentary material which the President has refused to produce.

I mention these three solely to say to you that it is true, as Mr. Garrison argues, that you draw inferences, adverse or favorable as the case may be, in the light of the context of the evidence before you. And here in the three instances (and there are more) in which this matter arose, this context, something that was relevant, material and pertinent and of adverse thrust to the President's position came to the attention of the committee.

Also in this connection I mention the President's edited transcripts. You may attribute the President's difficulties with the edited transcripts to the fact that maybe stenographers put headsets on and just typed away. We must accord to the President the benefit of that doubt. But that is beside the point. The point here is that there were substantial omissions from those edited transcripts as well as material differences in text that were adverse to the President's position, as you know, so, when you consider the drawing of adverse inferences in the light of context, you must consider not only the eight recorded transcripts which we deciphered, printed copies of which you have, as well as the comparison of White House edited transcripts and Judiciary committee transcripts of the same Presidential conversations. Our transcripts as against the edited transcripts of the same tapes revealed in a good many respects material differences, including omitted materials, adverse to the President's position.

I attribute no evil purpose with respect to the edited transcripts but I do say that when you determine whether you are going to draw adverse inferences with respect to tapes and documentary materials refused to you by the President, you must do so in the light of the contexts to which I have called your attention, not to mention others that time does not permit me to mention.

There is a second subject, the discretion of the prosecutor, to which Mr. Garrison alluded this morning. He thought that perhaps you ought to put yourself in the position of a prosecutor who is exercising discretion as to whether he is going to urge a grand jury to return an indictment. He suggested that a prosecutor wrestles with the question of guilt, and he suggested that you might likewise do so—he didn't say you should, he said you might. Mr. Garrison was fair throughout all his presentation and it was very well done and I compliment him on it. I join with the comments that have been made complimenting him. But I say that if you are inclined to accept his suggestion you need not go beyond the record before you. In that record is the answer. Henry Petersen was a prosecutor. He reached the conclusion that at least Mr. Ehrlichman and Mr. Haldeman and Mr. Dean should be indicted and he spoke to the President about that. You must also have in mind when you are considering that context that Mr. Jaworski has returned a number of indictments of the closest of Presidential aides. You must also have in mind that the grand jury made a presentment to this committee on top of it. Those are reasonable people. They exercised serious judgment, constitutional judgment in this case. And lastly that very grand jury has named the President as an unindicted coconspirator. What I am saying is I don't think that the discretion of the prosecutor standard is one that is applicable here, but if applicable, you have at least those four instances in which that discretion was exercised in favor of both action and prosecution.

I call your attention to the fact that the Constitution provides first that the House shall have the sole power of impeachment, and second, and separately, that the Senate shall have the sole power of trial, conviction, and removal. The House is not to invade the Senate's function. This is a constitutional matter. It is very serious. All of you want to be right in your hearts, all the rest of your lives, no matter which way you vote. In order to do so, you have to be pretty well convinced in your hearts. That is the ultimate test, a very strong test. But convinced of what? Convinced that there is evidence here, both circumstantial and direct, clear evidence, that there is sufficient here to warrant the presentation of this very serious matter to the Senate of the United States for trial.

I am not going to argue the evidence at all. I am not going to say anything at all about the evidence. All I am going to say is that the rules of evidence—oh, by the way, Mr. Chairman, I should say this. There are two citations in Mr. Garrison's brief to the proposed Federal Rules of Evidence. However, both of the rules he cites are ones that subcommittee No. 7 of this committee, chaired by the distinguished gentleman from Missouri, Mr. Hungate, did not approve. Neither of them is in the House's Federal Rules of Evidence bill that is now in the Senate. The rules cited by Mr. Garrison were advanced to this committee in the material submitted by the U.S. Supreme Court to the House. I had the honor of being chairman of the Judicial Conference Advisory Committee that drafted those proposed rules. However, Mr. Hungate's subcommittee and thereafter this committee and still later the House, did not approve them.

I would like to say a word or two about another aspect of the drawing of inferences. I said something about one aspect a few moments ago when I discussed the subject of adverse inferences. But what I'd

like to say a few words about now is the matter of inferences upon inferences. It has been said repeatedly here that you can't draw an inference upon inference. This is not the law, as Wigmore points out in volume 1, section 41, of his great work. It is an achronism. Drawing an inference on an inference is perfectly proper. My statement needs fleshing out. If one observes a truck moving down the street lettered Jones Grocery & Market, a proper inference to be drawn is that the truck is owned or leased by Jones Grocery & Market. From this inference may be drawn the further inferences that the driver of the truck is the employee of Jones Grocery & Market and that he is engaged in the business of Jones' Grocery. These are inferences upon inferences. They may be rebutted, but they are properly drawn in the first instance. So, it is not the law of evidence that an inference may not be predicated upon or drawn from another inference.

There have been suggestions that inferences are weak evidence. This is but a general truism applicable to all evidence. Not all evidence is strong. Not all evidence is weak. We must return to the context of the inference. If the context is strong, then the inference is strong.

It is also properly argued that if two inferences equally valid and founded on the same context can be drawn from the same evidence, one incriminating and one exculpatory, then the exculpatory inference prevails or must be drawn. But you must first take a hardheaded look at the evidence. If you then throughly believe in your heart, in your mind, that two inferences, one good and one bad, can be drawn from the same facts, then, of course, you must take the inference that favors the President of the United States. If you conclude, however, that two inferences can be drawn that are not equally balanced, then you must draw the inference that predominates. Whichever way you draw those inferences you will be doing so in favor of the Constitution and pursuant to your constitutional responsibility.

You are all lawyers. You have been acting and conducting yourselves splendidly, absolutely splendidly, in seeking through all the manner and means the evidence affords, and with the help of staff and others, to reach the truth in this serious constitutional matter. I have every confidence that whatever your individual vote, it will be only after you have studied the record, weighed the evidence carefully, and searched your conscience and with your country and your Constitution and the hopes and longing of the people fully in mind at all times.

Thank you, ladies and gentlemen. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Jenner.

[The Minority Memorandum on Facts and Law presented to the Committee on the Judiciary on July 22, 1974, follows:]

# MINORITY MEMORANDUM ON FACTS AND LAW

# INTRODUCTION

By resolution dated July 16, 1974, the minority members of the committee directed the minority staff to prepare an assessment of the statements of information presented by the impeachment inquiry staff to the committee during the course of its inquiry, including factual analysis and arguments both for and against the sufficiency of the evidence as to grounds for impeachment of the President. This memorandum is submitted in response to that directive.

The minority staff believes that two observations of general application are worth making at the outset. The first concerns the inferential nature of much of the case against the President, and the operation of inferences in our law. The second concerns the nature of the decision which the members of the committee are to make.

## 1. Inferences

### in general

The members of the committee can judge for themselves to what extent the case against the President rests upon circumstantial evidence and upon inference. To the extent this does seem to be the posture of any facet of the case, it may be borne in mind that:

(a) An "inference" is a process whereby a fact not directly established by the evidence is deduced as a logical consequence of some other fact, or state of facts, which is directly established by the evidence. A trier of fact is never required to draw an inference from any established fact. The process is a permissive one.[1]

(b) Where two possibilities can be inferred from the evidence, neither can be said to have been "proved." [2]

(c) Some inferences are impermissible as a matter of law. "Permissible inferences must be within the range of reasonable probability, and it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture." [3]

[1] Compare rule 303 of the proposed Federal rules of evidence:

"Presumptions in Criminal Cases

"(b) Submission to jury. The judge is not authorized to direct the jury to find a presumed fact against the accused. When the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. When the presumed fact has a lesser effect, its existence may be submitted to the jury if the basic facts are supported by substantial evidence, or are otherwise established, unless the evidence as a whole negatives the existence of the presumed fact.

"(c) Instructing the jury. Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt."

56 F.R.D. 183, 212 (1973). This rule is intended to be declarative of existing law.

[2] *McNamara* v. *United States*, 199 F. Supp. 879 (D. D.C. 1971).

[3] *Wratchford* v. *S. J. Groves and Sons Co.*, 405 F.2d 1061, 1066 (4th Cir. 1969).

(d) A jury may not draw an inference from an inference (the so-called "double inference" rule). A jury should not be allowed to draw any inference from circumstantial evidence, if that evidence permits two inferences, one as probable as the other.[4]

ADVERSE INFERENCE RULE

The adverse inference rule is stated by Wigmore as follows:

The opponent's spoliation [destruction] or suppression of evidential facts . . . and particularly of a document . . . has always been conceded to be a circumstance against him, and in the case of a document, to be *some evidence* that its contents are as alleged by the first party. But that a rule of presumption can be predicated is doubtful.[5]

The Supreme Court has described the rule as follows:

*Having introduced evidence which, uncontradicted and unexplained, was sufficient to sustain its charge,* The United States was not required to call the principal representative of the company. . . . Where probable proof is brought of a state of fact tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered,—though not alone entitled too much weight; because the burden of proof lies on the accuser to make out the whole case by substantive evidence. . . . This is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused, not accessible to the prosecution.

While Sinclair's failure to testify cannot properly be held to supply any fact not reasonably supported by the substantive evidence in the case . . . , it justly may be inferred that he was not in a position to combat or explain away any fact or circumstance *so supported by evidence* and material to the government's case. . . . As to facts appearing to have been within the knowledge or power of Sinclair, we find that the evidence establishes all that it fairly and reasonably tends to prove.[6]

In a later case, the Court stated:

The failure under the circumstances to call as witnesses those officers who did have authority to act for the distributors and who were in a position to know whether they had acted in pursuance of agreement is itself persuasive that their testimony, if given, would have been unfavorable to appellants.[7]

EXCEPTIONS TO ADVERSE INFERENCE RULE

The adverse inference rule cannot be applied when the party from whom evidence is sought has a Constitutional right to withhold it from the party seeking its production.[8] Similarly, if the document sought is the subject of a privilege, the inference is not proper.[9]

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[4] *Pennsylvania Railroad* v. *Chamberlain,* 288 U.S. 333, 339; compare *Lavender* v. *Kurn,* 327 U.S. 645.

[5] 9 Wigmore, Evidence (3d ed.) § 2524 (emphasis supplied).

[6] *Mammoth Oil Co.* v. *United States,* 275 U.S. 13, 51–52 (1927), (emphasis supplied).

[7] *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208, 225–26 (1939).

[8] *International Union (U.A.W.)* v. *NLRB,* 459 F.2d 1329 (D.C. Cir. 1972).

[9] 2 Wigmore, Evidence, (3d ed.) § 291.

In *Griffin* v. *California,* 380 U.S. 609 (1965), a case involving the privilege against self-incrimination, the Supreme Court held that it was constitutionally forbidden for the prosecution to make any comment upon the failure of a defendant to take the stand, or for a judge to instruct a jury that such failure constitutes evidence of guilt.

The proposed Federal Rules of Evidence provide as follows:

"RULE 513.—COMMENT UPON OR INFERENCE FROM CLAIM OF PRIVILEGE; INSTRUCTION

"(a) Comment on inference not permitted. The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

". . . (c) Jury instruction. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom."

The Advisory Committee's note to rule 513 states,

"Destruction of the privilege by innuendo can and should be avoided. Tallo v. United States, 344 F.2d 467 (1st Cir. 1965); United States v. Tomaiolo, 249 F.2d 683 (2d Cir. 1957); San Fratello v. United States, 343 F.2d 711 (5th Cir. 1965); Courtney v. United States, 390 F.2d 521 (9th Cir. 1968)."

56 F.R.D. 183, 260–61 (1973). The proposed Rules are not yet effective, but Rule 513 is intended to be declarative of existing law.

Nor can an adverse inference arise against a party for failing to produce evidence that is merely corroborative or cumulative.[10] Finally, a party who has the burden of persuasion as to an issue cannot avail himself of the inference until he has produced sufficient evidence to shift the burden of going forward to the other side.[11]

OPERATION OF THE ADVERSE INFERENCE RULE IN THIS CASE

(a) As the statement of the adverse inference rule by Dean Wigmore indicates, the most familiar application of the rule is in a situation where one party to a suit demands a specific document from another party, and the other party refuses to produce it. Frequently that document will have operative legal significance—that is, in a contract dispute, or, in a criminal case,[12] where the document sought might constitute a means or instrumentality of crime (written threat, attempt to bribe, et cetera).

In the present case, the committee has issued subpenas for tapes, transcripts, dictabelts, memorandums, or other writings or materials relating to 147 Presidential conversations, as well as for the President's daily diaries for an aggregate period of many months.

It is true that these subpenas have been issued only after the committee's staff submitted to the committee memorandums justifying each set of requests, in terms of their necessity to the committee's inquiry. But in most cases, what these justifications tend to show is that given the chronology of facts known to the committee, the President was, at a certain point in time, in a position to receive certain information, to have certain knowledge, or to have discussions with his aides on certain topics. In other words, in many cases the committee lacks any independent evidence that the conversations or other materials subpenaed involved the commission of a crime (or other offense). What is not lacking is suspicion. To build a case upon an inference based in turn upon a suspicion is inappropriate for this inquiry.

(b) Second, it may be asked, even if it were proper to apply the adverse inference rule here, what inferences could be drawn? The inferences presumably would show that the material subpenaed was in some way damaging to the President. But there is no way of knowing why the material would be damaging: because it would show that the President used abusive language of his personal and political enemies? that the President was interested in raising a great deal of money for his reelection campaign? or that the President actually made statements or took actions which constituted crimes?

Beyond that, if the adverse inference rule were applied to establish that the material subpenaed would support the argument that the President committed crimes, that would not answer the question of what criminal case against the President would be thus supported. It might be a willful obstruction of justice, or bribery, or it might be the passive concealment of the crime of another.

In sum, it is difficult to see, if the adverse inference rule is applied, how the committee can give shape to the facts supposed to be established by the adverse inferences. It can hardly be argued that the

[10] *Gafford* v. *Trans-Texas Airways*, 229 F. 2d 60 (5th Cir. 1962).
[11] *Vanity Fair Paper Mills, Inc.* v. *F.T.C.*, 311 F. 2d 480 (2d Cir. 1962).
[12] The operation of the adverse inference rule in a criminal case is subject to the Constitutional limitations imposed by the doctrine of *Griffin* v. *California*, 380 U.S. 609 (1965), *supra*, n. 9.

adverse inference rule should be taken, by either the House or the Senate, to establish every accusation which has been made against the President.

(c) As noted above, the rule does not apply where the party seeking evidence has other means of securing it. In the present case, although it may be that the committee has no other means of securing copies of the tapes of Presidential conversations which it seeks, an argument could be made that the content of those conversations could be pursued by vigorous questioning of the persons who participated in them.[13]

(d) Finally, although the President has not claimed his privilege against self-incrimination, he has claimed a Presidential privilege to maintain the confidentiality of the Presidential decisionmaking process. This argument is discussed below in part IV of this memorandum, but for present purposes suffice it to say that this species of executive privilege has been recognized as valid at least in other contexts.[14] To the extent that the privilege is regarded as having any vitality in the context of the committee's inquiry, no adverse inference can be drawn.[15]

### 2. Exercise of Political Judgment in the Impeachment Decision

Another point of general application is that the Members of Congress cannot be deprived of their discretion whether or not to impeach an officer. Though there may be cases where impeachment very obviously should lie, there is also no offense which as a matter of law obliges the House to impeach an officer or the Senate to convict him. As the committee staff's report on grounds for Presidential impeachment indicates, "The reasons for failing to impeach are generally not stated, and may have rested upon a failure of proof, legal insufficiency of the grounds, political judgment, the press of legislative business, or the closeness of the expiration of the session of Congress." [16]

If impeachable conduct—that is, conduct for which Congress may impeach—is analogized to a statutory offense, the "political" discretion of Congress is analogous to prosecutorial discretion or to a power of mitigation or pardon which is lodged in the executive, rather than in the legislature which defined the offense or the court which tried it. The analogy may be confusing because in the impeachment context, both the power to prosecute and try the offense, and the power to waive or pardon the offense, are lodged in the same body—namely, Congress—and, moreover, both must be exercised at the same time. The result, that is, whether to impeach or whether to convict, appears to be a single decision, but is really the product both of an adjudicative decision (is the conduct impeachable?) and an executive-discretionary decision (ought the officer to be impeached/removed?).

The primary purpose of impeachment, it is often argued, is not to punish the officer,[17] but to protect the country's system of government,

[13] This argument would not apply to conversations between the President and H. R. Haldeman, who has indicated that he would claim his constitutional privilege against self-incrimination if called as a witness by the committee.

[14] *Senate Select Committee* v. *Nixon*, D.C. Cir., Civ. No. 74–1258 (May 23, 1974), slip opinion at p. 9; *Nixon* v. *Sirica*, 487 F.2d 700, 717 (D.C. Cir. 1973).

[15] See n. 9, *supra*.

[16] Constitutional Grounds for Presidential Impeachment, Report by the Staff of the Impeachment Inquiry, Committee on the Judiciary, House of Representatives, 93rd Cong., 2d Sess. (February 1974), (hereafter "Staff Report on Grounds for Impeachment"), 17.

[17] See Staff Report on Grounds for Impeachment, 24.

and thereby to protect the people of the country. It is accordingly not only proper but necessary for Congress, having concluded that an officer has engaged in conduct for which he could properly be impeached, then to step back and assess the situation more generally, to determine (a) whether under all the circumstances, including both aggravating and mitigating factors, the officer is liable to removal, and (b) whether the best interests of the country would be served by his removal or continuance in office.

# WATERGATE CASE

## Criminal Law Analysis

The June 5, 1972 grand jury of the U.S. District Court for the District of Columbia voted on February 25, 1974, to name Richard M. Nixon, President of the United States, as an unindicted member of the conspiracy to defraud the United States and to obstruct justice charged in count I of the indictment returned by that grand jury on March 1, 1974, in the case of *United States* v. *Mitchell, et al.*[1] Simultaneously with the issuance of this indictment, the grand jury filed with the court a Report and Recommendation requesting that certain evidentiary materials obtained by the grand jury in the course of its investigation of the circumstances surrounding the Watergate burglary be forwarded to the Committee on the Judiciary of the House of Representatives. On March 26, 1974, by order of Chief Judge John J. Sirica, the report and recommendation and accompanying evidentiary materials were conveyed to the committee pursuant to the grand jury's request.

The action of the grand jury served to sharpen what had already become a central question of this impeachment inquiry:

> Did the President, at any time between June 17, 1972 and the present day, become a knowing and intentional participant in a criminal conspiracy to obstruct justice in connection with the official investigation of the Watergate break-in?

### LAW OF CONSPIRACY: GENERAL

Essentially, a criminal conspiracy is a combination, concert, or agreement of two or more individuals for the purpose of committing a criminal act, or to do a lawful act by criminal or unlawful means.[2]

It is generally accepted by the Federal courts that circumstantial evidence may be used to establish the existence of a conspiratorial agreement, particularly since such an agreement, by its very nature, is characterized by secrecy, and therefore rarely is there direct evidence establishing the existence of a conspiracy.[3] No particular form of agreement or express assent is required to constitute a criminal conspiracy under 18 U.S.C. § 371, as long as the necessary purpose of the agreement is the commission of some Federal offense, even though all the elements of the substantive offense are not covered by the agreement.[4] It well established that a "tacit understanding" as demonstrated by a certain course of conduct is sufficient to establish an agreement.[5] A conspiracy may be deduced from the conduct of the parties.[6]

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[1] Cr. No. 74–110.

[2] *Pettibone* v. *U.S.*, 148 U.S. 197, 203; *U.S.* v. *Perlstein*, 126 F. 2d 789, *Cert. denied*, 316 U.S. 678.

[3] *Ingram* v. *U.S.*, 360 U.S. 672; *Blumenthal* v. *U.S.*, 332 U.S. 539, 557; *Baker* v. *U.S.*, 329 F. 2d 786, *cert. denied*, 379 U.S. 853; *U.S.* v. *Lutwak*, 195 F. 2d 748, 753, *aff'd*, 344 U.S. 604; *U.S.* v. *Mack*, 112 F. 2d 290.

[4] *U.S.* v. *Roselli*, 432 F. 2d 879, 892, *cert. denied*, 401 U.S. 924; *U.S.* v. *Tuffanelli*, 131 F. 2d 890, *cert. denied*, 318 U.S. 772.

[5] *Direct Sales Co.* v. *U.S.*, 319 U.S. 703, 714.

[6] *Babb* v. *U.S.*, 27 F. 2d 80, *cert. denied*, 278 U.S. 624.

It is not necessary to prove that a particular defendant was aware of all the aims of the conspiracy or of the identity of all its participants. The requisite agreement may exist without knowledge on the part of all the conspirators of all the details of the conspiracy or of the identity of all the coconspirators.[7] To convict one as a conspirator, however, it is necessary to show that he know or understood the essential nature or the purpose of the conspiracy, and that he intended to violate the criminal statute or commit the substantive crime which was the object of the conspiracy.[8] Furthermore, the requisite criminal intent must be at least of the degree of criminal intent which would be necessary to sustain a conviction for the substantive offense itself.[9] It has been held that a critical inquiry in any conspiracy case involves a determination of the kind of agreement or understanding that existed as to each defendant as he understood it.[10]

It should be noted that 18 U.S.C. § 371, relating to conspiracies to "defraud the United States" or any agency thereof, in any manner or for any purpose, is not confined to fraud as that term had been used in the common law, and it reaches any conspiracy for the purpose of impairing, obstructing, or defeating any lawful governmental function by deceit, craft or trickery, or by means which are dishonest.[11] Neither pecuniary loss to the United States nor receipt of consideration is essential to a finding of a violation of section 371 relating to conspiracy to defraud the United States.[12]

The conspiratorial agreement is a crime in itself under 18 U.S.C. § 371, independent of the commission of the particular offense which is the object of the conspiracy. Since the gravamen of the crime of conspiracy is the agreement, the substantive crime itself need not be effectuated.[13] However, section 371 requires an "act to effect the object of the conspiracy". Thus, the unlawful plan or agreement must be followed by at least one overt act or some conduct in furtherance of the plan or agreement, before there can be a maturation of the crime of conspiracy.[14] The overt act need not be a criminal act; it may be an act of preparation. and it need be done by only one of the conspirators.[15]

As the foregoing discussion indicates, the elements of a criminal conspiracy include:

(1) A criminal objective to be accomplished, or a lawful objective to be accomplished by criminal means;

(2) Some form of an agreement or understanding between two or more individuals whereby they become definitely committed to cooperate for the attainment of the objective pursuant to an express or implied plan or scheme embodying the means for its attainment (or by any effective means);

(3) Knowledge or understanding by participating conspirators of the nature or purpose of the conspiracy and a criminal

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[7] *Blumenthal* v. *U.S.*, 332 U.S. 539, 557; *U.S.* v. *Projansky*, 465 F. 2d 123, 135, *cert. denied*, 409 U.S. 1006; *U.S.* v. *Aaueci*, 310 F. 2d 817, 826, *cert. denied*, 372 U.S. 959.

[8] *U.S.* v. *Cardi*, 478 F. 2d 1362; *Miller* v. *U.S.*, 382 F. 2d 583, *cert. denied*, 390 U.S. 984; *U.S.* v. *Sheiner*, 273 F. Supp 977; *aff'd* 410 F. 2d 337, *cert. denied*, 396 U.S. 825;

[9] *Ingram* v. *U.S.*, 360 U.S. 672; *Carter* v. *U.S.*, 333 F. 2d 354.

[10] *U.S.* v. *Cirillo*, 468 F. 2d 1233, *cert. denied*, 410 U.S. 989.

[11] *Dennis* v. *U.S.*, 384 U.S. 855; *U.S.* v. *Johnson*, 383 U.S. 169; *U.S.* v. *Sweig*, 316 F. Supp 1148.

[12] *U.S.* v. *Peltz*, 433 F. 2d 48, *cert. denied*, 401 U.S. 955.

[13] *Callanan* v. *U.S.*, 364 U.S. 587, 593; *Pinkerton* v. *U.S.*, 328 U.S. 640, 643.

[14] *U.S.* v. *Skillman*, 442 F. 2d 542, 547, *cert. denied*, 404 U.S. 833; *Cross* v. *U.S.*, 392 F. 2d 360.

[15] *Braverman* v. *U.S.*, 317 U.S. 49, 53.

intent to violate the criminal statute or commit the substantive offense which is the object of the conspiracy; and

(4) An overt act in furtherance of the objective of the conspiracy.[16]

Once a conspiracy becomes "complete" with the commission of the first overt act, in the sense that the word is ordinarily used to represent the establishment of a conspiracy, it continues in existence until the final objective of the conspiracy is accomplished or until there is shown some affirmative act of abandonment or termination.[17]

### JOINING AN ONGOING CONSPIRACY

One need not be a member of a conspiracy from its inception, but can join a continuing conspiracy at any time.[18] Those who join a conspiracy during its progress and cooperate in the common effort to obtain the unlawful results become parties thereto and assume responsibility for all preceding acts in furtherance of the scheme, as well as subsequent acts.[19] As in the case of an original conspiracy, it is not essential that the individual joining an existing conspiracy have knowledge of all the details of the conspiracy, nor even of the identity of all his coconspirators.[20]

### KNOWLEDGE AND INTENT

Criminal conspiracy involves more than a general *mens rea:* a showing of specific intent is required.[21] Mere association with the conspirators is not enough.[22] Nor is mere knowledge of the criminal aspects of the enterprise sufficient, even though knowledge must be shown.[23]

In addition to proof of actual knowledge, there must be a showing of an "intent to participate." [24] To establish membership in an ongoing conspiracy, it must be demonstrated (either through direct or circumstantial evidence) that the individual had knowledge of the conspiracy, and in some fashion contributed his efforts, participated in an act in furtherance of the conspiracy, or otherwise manifested his intent to participate.[25] The defendant must in some sense promote the venture himself, make it his own, have a stake in the outcome.[26] There must be some affirmative action, but a single act may be sufficient to draw an individual within the ambit of conspiracy.[27]

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[16] *Pinkerton* v. *U.S.*, 145 F. 2d 252; *U.S.* v. *Bostic*, 480 F. 2d 965; *U.S.* v. *Guterma*, 189 F. Supp. 265.

[17] *U.S.* v. *Perlstein*, 126 F. 2d 789, *cert. denied*, 316 U.S. 678; *Nyquist* v. *U.S.*, 2 F. 2d 504, *cert. denied*, 267 U.S. 606.

[18] *Phelps* v. *U.S.*, 160 F. 2d 858; *cert. denied*, 396 U.S. 1060; *U.S.* v. *Lester*, 282 F. 2d 750; *U.S.* v. *Dardi*, 330 F. 2d 316.

[19] *Lefco* v. *U.S.*, 74 F. 2d 66.

[20] *U.S.* v. *Bolin*, 423 F. 2d 834; *U.S.* v. *Thomas*, 468 F. 2d 442, *cert. denied*, 410 U.S. 935; *U.S.* v. *Cimino*, 427 F 2d 129. *cert. denied*, 400 U.S. 911.

[21] *Baywood* v. *U.S.*, 232 F. 2d 220, 225, *certiorari denied*, 351 U.S. 982 (1956); *U.S.* v. *Mack*, 112 F. 2d 290, 292 (1940).

[22] *U.S.* v. *Stromberg*, 268 F. 2d 256 (1959); *Dennis* v. *U.S.*, 302 F. 2d 512 (1962); *U.S.* v. *Steele*, 469 F. 2d 165. 168 (1972).

[23] *Thomas* v. *U.S.*, 57 F. 2d 1039, 1042 (1932).

[24] *U.S.* v. *Aviles*, 274 F. 2d 179, 189 (1959), *cert. denied*, 362 U.S. 974 (1960).

[25] *Nassif* v. *U.S.*, 370 F. 2d 147. 152 (1966).

[26] *U.S.* v. *Falcone*, 109 F. 2d 579, *aff'd*, 311 U.S. 205 (1940). This "stake in the outcome" or "stake in the venture" test applied in *Falcone* has been utilized by some courts to establish the requisite specific intent. The test has been particularly popular with the Second Circuit Court of Appeals. However, it has not won universal acceptance. See: *Direct Sales Co.* v. *United States*, *supra*; *United States* v. *Tramaglino*, 197 F. 2d 928, 930 (1952); *Johns* v. *United States*, 195 F. 2d 77, 79–80 (1952): 72 *Harv. L. Rev.* 920, 931 (1959).

[27] *U.S.* v. *Carminati*, 247 F. 2d 640, *cert. denied*, 355 U.S. 883 (1957); *U.S.* v. *Aviles*, *supra.*

In order to determine the President's criminal liability according to the law of conspiracy, as of any given moment in time, the committee must determine whether the President has, by any affirmative action, including words, manifested an intent to associate himself with others in an enterprise whose criminal purpose is known to him.

### DUTY TO ACT

There is a line of cases suggesting that one who has an official duty to act to prevent the achievement of the aims of a criminal conspiracy may be liable as a coconspirator if he learns of the conspiracy but fails to act to thwart it.[28] In each of these cases, the criminal liability of a law enforcement officer was at issue; in *Jezewski* (see fn. 28), the conviction of a mayor was also upheld.

It is important to note, however, that even under the *Burkhardt* analysis (see fn. 28), the intent to participate must be proved. The officer will not be held criminally liable for his own inaction unless it is proved that his failure to act did not stem from mere indecision or from some innocent motive but was intended by him to be his contribution to the success of the conspiracy.

Based partly on the *Burkhardt* principle, the model penal code of the American Law Institute includes a provision for criminal liability predicated upon failure to perform a legal duty to prevent crime:

* * * (3) A person is an accomplice of another person in the commission of an offense if:

"(a) with the purpose of promoting or facilitating the commission of the offense, he * * *."

* * * * * * *

"(iii) having a legal duty to prevent the commission of the offense, fails to make proper effort to do so * * *."

(Section 2.06(3)(a)(iii) of the Model Penal Code (1962).)

### OBSTRUCTION OF JUSTICE STATUTES

Title 18, U.S. Code, § 1503 provides:

#### INFLUENCING OR INJURING OFFICER, JUROR OR WITNESS GENERALLY

Whoever corruptly, or by threats of force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate or other committing magistrate, or any grand or petit jury, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate or other committing magistrate, in the discharge of his duty, or injures any part or witness in his person or property on account of his attending or having attended such court or examination before such officer, magistrate, or other committing magistrate or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisonment not more than five years, or both.

[28] *U.S.* v. *Burkhardt*, 13 F. 2d 841 (6th Cir. 1926); *Jezewski* v. *U.S.*, 13 F. 2d 599 (6th Cir. 1926); *Lutheran* v. *U.S.*, 93 F. 2d 395, 400 (8th Cir., 1937), *cert denied*, 308 U.S., 644, *reh. denied*, 303 U.S. 668.

Title 18, U.S. Code, § 1505, provides:

OBSTRUCTION OF PROCEEDINGS BEFORE DEPARTMENTS, AGENCIES, AND COMMITTEES

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or

* * * * * * *

Whoever corruptly, or by threats of force, or by any threatening letter or communication influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress——

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Title 18, U.S. Code, § 1510, provides:

OBSTRUCTION OF CRIMINAL INVESTIGATIONS

(a) Whoever willfully endeavors by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investgator; or

Whoever injures any person in his person or property on account of the giving by such person or by any other person of any such information to any criminal investigator——

Shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(b) As used in this section, the term "criminal investigator" means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigation of or prosecutions for violations of the criminal laws of the United States.

DISCUSSION

Guided by the general principles of conspiracy law outlined above, one must review the evidence in the Watergate area with special sensitivity to any showing of facts or circumstances tending to prove or disprove Presidential knowledge of the conspiracy or intent to join it.

The President's words, as well as his other actions, at each step of the way from June 17, 1972, until the present day must be scrutinized to determine whether they manifest his knowledge, suspicion or ignorance about critical facts.

It should be noted that, strictly speaking, if the President became a party to an ongoing conspiracy at any time after the Watergate break-in, his criminal liability under 18 U.S.C. 371 would immediately attach. Any discussion of events occurring after the point (if any) at which a member of the committee might conclude that the President had joined the conspiracy, would therefore be pertinent to the establishment of additional liability for substantive offenses committed after his entry. Similarly, a member's perception of the duration and nature of the President's involvement, if any, could be thought pertinent either in aggravation (if the involvement was early and active) or

mitigation (if the involvement was later and passive) of Presidential culpability. As is often true in ordinary criminal cases, some facts and dates may be thought not only probative of whether the President joined the conspiracy at all, but also revelant to the question whether it is appropriate for the Congress to impose in this case the sole sanction available to it; namely, removal from office.

[At this point Mr. Garrison offered in oral argument an explanation of the President's words and actions different from the theory of criminal conspiracy adopted in principle, if not in terms, in the summary of information prepared by the majority staff. The text of Mr. Garrison's oral argument is at pages 53 of this volume.]

# ABUSE OF PRESIDENTIAL POWERS

## Introduction

The "Summary of Information" has grouped a number of disparate allegations against the President under the heading "Abuse of Presidential Powers." If this is merely a matter of convenience of organization, the grouping is of no importance; but if, as seems more likely, the notion of "abuse of power" is intended to serve as the thread linking activities as different as the improvements at Key Biscayne, the Senate testimony of Attorney General-Designate Kleindienst, and the establishment of the Special Investigations Unit, all of which together will constitute an impeachable pattern of "abuse of power," then the point merits some examination.

First, it is open to serious question whether a formulation such as "abuse of power" affords a President whose conduct is the subject of a formal impeachment inquiry the protection which the Framers intended him to enjoy under the impeachment clause—let alone the due process clause.

When the Framers voted to include the power to impeach the President in our Constitution, they were extremely wary of making the Executive too dependent upon the legislature.[1] The impeachment power adopted by the Framers was narrow and limited compared to that which Parliament had enjoyed in England. Mason's suggestion that maladministration be added as a ground was rejected because it was felt that "so vague a term will be equivalent to a tenure during pleasure of the Senate."[2] Maladministration had been a principal ground for impeachment in England.[3] The Framers also cut back on the impeachment power indirectly via several related provisions of the Constitution. Congressional bills of attainder and ex post facto laws, which had supplemented the impeachment power in England, were forbidden. The consequences of impeachment and conviction, which had not infrequently meant death in England, were limited to removal from office and disqualification to hold further office. Impeachment in the United States could be directed only against civil officers of the National Government, whereas Parliament had possessed the power to impeach private citizens. Treason was defined in the Constitution so that Congress acting alone could not change the definition, as Parliament had been able to do. The grounds for impeachment—unlike the grounds for impeachment in England—were similarly fixed in the Constitution, as a check on the power of Congress.

It may be questioned whether "abuse of power" may be precisely the kind of vague formulation of an impeachment charge, devoid of independent content, which the Framers sought to avoid.

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[1] See generally "Staff Report on Grounds for Impeachment," pp. 33–35 (remarks of Gouverneur Morris, Charles Pinckney, Rufus King, and Edmund Randolph); 2 J. Elliot "Debates in the Several State Conventions on the Adoption of the Federal Constitution," 511–12; R. Berger "Impeachment: The Constitutional Problems," 117–120, ns. 65, 71.

[2] 2 "The Records of the Federal Convention of 1787" (M. Farand ed., 1911) 550.

[3] 4 W. Blackstone "Commentaries on the Laws of England" (1771) 119, 121.

The Summary of Information lists seven categories of abuse of power, and indicates that "the issue in each of these areas is whether the President used the powers of his office in an illegal *or improper* manner to serve his personal, political, or financial interests." ("Summary of Information, Abuse of Presidential Powers," p. 2) (emphasis added). The vice of such a formulation of the gravamen of the alleged impeachable offense is that it would be too elastic and standardless even if the charge contained only one specification. What is the test for impropriety? Is an impeachable offense made out whenever a President uses the powers of his office in an improper manner to serve his political interests? Does an action, otherwise lawful or proper, become illegal or improper if it is motivated by a desire to discredit members of the opposition party? By a desire to conceal politically embarrassing information? By political considerations? [4] Must the President's action, in order to be impeachable, be motivated by a criminal intent, or only an improper intent? [5]

Where official conduct is alleged to be improper but not necessarily illegal, it is difficult to understand how the respective parameters of proper and improper conduct are to be delineated, without at least attempting to determine the customary practice in prior administrations with respect to matters of the same nature as those to which the allegations discussed in section II of the "Summary of Information" relate. Such comparisons have not been undertaken by the inquiry staff.

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[4] The exemption of White House staff from the Hatch Act's prohibition on political activity by Federal employees may be noted.

[5] A noted scholar on American impeachment practice has written that since it sits as a court in cases of impeachment, "the Senate must find an intent to do wrong. It is, of course, admitted that a party will be presumed to intend the natural and necessary results of his voluntary acts, but that is a presumption only, and it is not always inferable from the act done. So ancient is this principle, and so universal is its application, that it has long since ripened into [a] maxim, . . . and has come to be regarded as one of the 'fundamental legal principles' of our system of jurisprudence." A. Simpson "Treatise on Federal Impeachments" (1916) 29.

This conclusion seems to have been the intent of the Framers. As Edmund Randolph stated in the Virginia Ratifying Convention, "No man ever thought of impeaching a man for an opinion. It would be impossible to discover whether the error in opinion resulted from a willful mistake of the heart, or an involuntary fault of the head." "Staff Report on Grounds for Impeachment," p. 14.

To similar effect is the view expressed by James Iredell in the North Carolina Ratifying Convention: "I beg leave to observe that, when any man is impeached, it must be for an error of the heart, and not of the head. God forbid that a man, in any country in the world, should be liable to be punished for want of judgment. This is not the case here." 4 J. Elliot "Debates in the Several State Conventions on the Adoption of the Federal Constitution" 125–26.

## Wiretaps

### 1. Introduction and Survey of Historical Practice with Respect to National Security Wiretapping

In early May 1969, following conversations between FBI Director J. Edgar Hoover, Henry Kissinger and Attorney General John Mitchell, the President authorized a specific wiretapping program in an effort to discover the source of leaks of classified government material. Under this program, which remained in effect until February 1971, wiretaps were instituted against 13 Government officials and four newsmen (book VII, 141–55). In each of the 17 cases, Attorney General Mitchell authorized the wiretap (book VII, 157–72). In no case, however, was a court order obtained.[1]

The purpose of this memorandum is to address the question whether the authorization or implementation of these wiretaps constituted a violation of statutory law or the Constitution on the part of the President, or an abuse of Presidential powers, which would warrant his impeachment.

#### *A. Outline of the Discussion*

Wiretapping and "bugging" are the most common methods of electronic surveillance. Electronic surveillance by government agencies is subject to the provisions of the fourth amendment and of title III of the Omnibus Crime Control and Safe Streets Act of 1968.[2] Both the amendment and the statute require that electronic surveillance be authorized by a prior court order or warrant, subject to certain very narrowly defined exceptions. They also provide that, whether or not authorized by court order, the surveillance must be "reasonable." [3]

The issue under discussion is whether the 1969–71 wiretaps were exempt from the warrant requirement by virtue of the fact that they were allegedly undertaken for "national security" purposes; and if so, whether they satisfied the requirement of reasonableness under the fourth amendment. The discussion may be summarized as follows:

During the period in question, the applicability (if any) of title III to cases of "national security" surveillance was ambiguous.[4] Regardless of whether or not the statute applied, however, these cases were still governed by the fourth amendment. The assertion of extraordinary Presidential powers in regard to "national security" cannot re-

[1] Elliot Richardson testimony, Senate Foreign Relations Committee Executive Session, September 10, 1973, 279 (unpublished excerpt from book VII, No. 3.3).

[2] 18 U.S.C. §§ 2510–2520 (1968), sometimes hereinafter referred to as title III.

[3] The fourth amendment prohibits "unreasonable searches and seizures." The requirement of "reasonableness" under title III is elaborated in the provisions of §§ 2518, "Procedure for interception of wire or oral communication"; see discussion of § 2518, *infra*.

[4] See discussion of § 2511(3), *infra*. The ambiguity was resolved by the Supreme Court in *United States* v. *U.S. District Court*, 407 U.S. 297 (1972), sometimes hereinafter referred to as the *Keith* case (after Judge Damon Keith, who wrote the district court opinion in the case).

move the 1969–71 wiretaps from the purview of the fourth amendment,[5] but might argue for a specific exception to the warrant requirement. Prior to the *Keith* decision in 1972, the courts had not resolved this question.[6] It is therefore necessary to examine the long-established rationale for certain narrow exceptions to the warrant requirement in the ordinary search and seizure context, in order to determine whether that rationale justifies a similar exception for "national security" wiretapping. A strong argument can be made that the principle underlying the recognized exceptions cannot be extended to cover warrantless wiretapping; and that the 1969–71 wiretaps were consequently in violation of the fourth amendment.

In view of the fact that the Supreme Court did not address the issue of warrantless "national security" surveillance until 1972, however, it may be thought that the President acted under color of law in authorizing the 1969–71 wiretaps.[7] If so, there remains the question whether the particular facts of this case demonstrate that the wiretaps were "reasonable"—whether there was probable cause for the initiation and extension of each wiretap. This is a judgment which must be made individually by each Member on the basis of his interpretation of the facts, and this memorandum will attempt no more than to point out certain appropriate lines of inquiry.

### *B. "National Security" and the Evolution of "National Security" Wiretapping*

The phrase "national security" represents a vague and indefinable concept. "It suggests no criteria which may be used to confine its meaning within any determinable limit and therefore does not lend itself to objective analysis." [8] Threats to the national security have been perceived in a wide spectrum of activities, ranging from the wartime espionage of enemy agents to expressions of domestic political dissent and the business of organized crime. Few would disagree with the proposition that espionage, sabotage and related acts by the agents of hostile foreign powers constitute a legitimate threat to the national security. Conversely, "[g]iven the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent." [9] Senator Hart elaborated on this problem during the floor debate on title III:

> As I read it—and this is my fear—we are saying that the President, on his motion, could declare—name your favorite poison—draft dodgers, Black muslims, the Ku Klux Klan, or civil rights activists to be a clear and present danger to the structure or existence of the Government.[10]

Indeed, an examination of the development of the phrase "National security" suggests that it may have no fixed meaning at all, though

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[5] But see discussion at *infra*.

[6] From 1969 to 1971 several district and circuit courts addressed the question of warrantless "national security" wiretapping, with inconsistent results. *United States* v. *U.S. District Court*, 444 F. 2d 651 (6th Cir. 1971) ; *United States* v. *Clay*, 430 F. 2d 165 (5th Cir. 1970) ; *United States* v. *Hoffman*, 334 F. Supp. 504 (D.D.C. 1971) ; *United States* v. *Sinclair*, 321 F. Supp. 1074 (E.D. Mich. 1971) ; *United States* v. *Smith*, 321 F. Supp. 424 (C.D. Cal. 1971) ; *United States* v. *O'Neal*, KC–CR 1204 (D. Kan. 1970) ; *United States* v. *Butenko*, 318 F. Supp. 66 (D.N.J. 1970) ; *United States* v. *Brown*, 317 F. Supp. 531 (E.D. La. 1970) ; *United States* v. *Dellinger*, Crim. No. 69–180 (N.D. Ill. 1970) ; *United States* v. *Stone*, 305 F. Supp. 75 (D.D.C. 1969).

[7] In 1972 the Supreme Court held that warrantless "domestic security" wiretapping violates the fourth amendment. The Court reserved judgment, however, "as to the issues which may be involved with respect to activities of foreign powers or their agents." *United States* v. *U.S. district court*, 407 U.S. 297, 322 (1972).

[8] Note, *Privacy and Political Freedom: Application of the fourth amendment to "National Security" Investigations*, 17 U.C.L.A. L. Rev. 1205, 1236 (1970).

[9] *United States* v. *U.S. District Court*, 407 U.S. 297, 314 (1972).

[10] 114 Cong. Rec. 14750 (1968).

its mere invocation may serve to legitimate the exercise of extraordinary presidential powers. It is further claimed that the President has the exclusive and largely unreviewable power to determine that a particular decision or action is necessary to protect the national security. The proper exercise of this discretion "is an awesome responsibility, requiring judgment and wisdom of a high order.[11]

Courts and commentators have attempted to analyze the functional meaning of "national security." The most common approach is to draw a geographical or subject-matter distinction between "foreign" and "domestic" matter.[12] The former category involves the hostile acts or intelligence activities of a foreign power; the latter involves the attempts of domestic organizations to use unlawful means to attack and subvert the existing structure of the government. As a general rule the phrase "national security" is used to refer only to the "foreign" category. Some authorities, unfortunately, add to the existing confusion by using "national security" to include both foreign and domestic activities.

This distinction is predicated on the President's exclusive power to conduct foreign relations, which is derived from the Constitution: "he shall receive Ambassadors and other public Ministers." [13] The President is frequently referred to as "the Nation's sole organ in the field of foreign affairs." [14] The language most often quoted on the necessity of judicial abstinence in the conduct of foreign relations is the following excerpt from the opinion of the Court in *C. & S. Air Lines* v. *Waterman Corp.:* [15]

> The President, both as Commander in Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.

The distinction between foreign and domestic affairs, however, is less useful than it may appear. First, in practice it is a very difficult distinction to draw. As the Supreme Court observed in the *Keith* case:

> [I]t will be difficult to distinguish between "foreign" and "domestic" unlawful activities directed against the Government of the United States when there is collaboration in varying degrees between domestic groups or organizations and agents or agencies of foreign powers.[16]

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[11] *New York Times Co.* v. *United States,* 403 U.S. 713, 729 (1971) (Stewart J., concurring).

[12] This approach was followed by Congress in drafting title III; see discussion of § 2511(3), *infra.* The Supreme Court drew the same distinction in *United States* v. *U.S. District Court,* 407 U.S. 297 (1972).

[13] U.S. Const. art. II, sec. 3.

[14] E.g., among wiretapping cases, *United States* v. *Smith,* 321 F. Supp. 424, 426 (C.D. Cal. 1971) ("the President's long-recognized inherent power with respect to foreign relations"); *United States* v. *Butenko,* 318 F. Supp. 66, 73 (D.N.J. 1970); *United States* v. *Stone,* 305 F. Supp. 75, 81 (D.D.C. 1969).

[15] 333 U.S. 103, 111 (1948). See also *United States* v. *Pink,* 315 U.S. 203 (1942); *United States* v. *Belmont,* 301 U.S. 324 (1937); *United States* v. *Curtiss-Wright Corp.,* 299 U.S. 304 (1936). None of these cases, however, involved individual liberties guaranteed by the Bill of Rights.

[16] *United States* v. *U.S. District Court,* 407 U.S. 297, 308 n. 8 (1972).

In an effort to clarify the distinction drawn by the Supreme Court, Attorney General Saxbe recently stated:

> The *Keith* decision says specifically that the only warrantless wiretap you can have must be substantiated by information that it is organized, financed and directed from a foreign power or organization without this country.

*Report of proceeding,* Hearing held before the Subcommittee on Administrative Practice and Procedure and the Subcommittee on Constitutional Rights of the U.S. Senate Committee on the Judiciary, and the Subcommittee on Surveillance of the U.S. Senate Committee on Foreign Relations; vol. 6, "Warrantless Wiretapping and Electronic Surveillance" (May 23, 1974), at 482 (hereinafter referred to as Senate subcommittee hearing).

For example, the "leaking" of classified information to the press has the same effect, in terms of disclosure to a hostile foreign power, as if the material had been sold to an enemy agent. Some might regard the latter as an act of foreign espionage but the former as an expression of domestic political dissent, a distinction which seems incongruous in view of the identical result. Other borderline cases can easily be imagined; indeed, the very nature of the activities in question frequently involves an intertwining of foreign and domestic elements.

Second, it might reasonably be argued that any rationale for granting the President extraordinary powers in national security cases should be based on the presence of a serious threat. The distinction between foreign and domestic activities, if conscientiously applied as a limitation on the exercise of extraordinary Presidential powers, arguably impairs the Government's ability to respond to a serious domestic subversive threat.[17] Conversely, the distinction can easily be abused to legitimate the persecution of domestic political dissenters whenever a foreign "contact", however attenuated, can be demonstrated.

A more useful analysis of the functional meaning of "national security" might be based instead on the seriousness of the threat to the state. A test of this sort was formulated by Justice Holmes in *Schenck* v. *United States*, 249 U.S. 47 (1919), a freedom of speech case arising from a violation of the Espionage Act of June 15, 1917:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.[18]

The "clear and present danger" test is widely applied in first amendment cases, and is embodied in title II.[19] The general principle is that in the case of a grave and imminent threat to the State which can effectively be countered only by the exercise of an extraordinary governmental power, individual rights and liberties otherwise guaranteed by the Constitution may be infringed. In the first amendment context, it is ultimately for the courts to decide as a question of law whether or not a clear and present danger existed.[20] In this respect the test differs significantly from the foreign-domestic distinction, which recognizes a special Presidential power in regard to the conduct of foreign affairs.

In the wiretapping field, "national security" has evolved not so much as a constitutional concept as a rubric under which the pragmatic policies of successive Presidents and Attorneys General with respect to warrantless wiretapping might be justified. "National security" wiretapping had its inception in 1940, but in order to understand the significance of this rationale for warrantless wiretapping it is instructive to review the context from which it arose.

In the period following World War I, wiretapping was extensively used by the Bureau of Prohibition (part of the Department of the

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[17] Attorney General Saxbe has pointed out that as a result of the *Keith* decision a "gap" exists in the law today inasmuch as the government is prohibited from carrying out warrantless wiretapping of a "vicious domestic terrorist organization." Senate subcommittees hearing (May 23, 1974), at 493–94.

[18] 249 U.S. at 52.

[19] § 2511(3) refers to "the constitutional power of the President" to take necessary measures to protect the Nation against various threats, including "any other clear and present danger to the structure or existence of the Government."

[20] *E.g.*, *Whitney* v. *California*, 274 U.S. 357, 374 et seq. (1927) (Brandeis and Holmes, J.J., concurring).

Treasury) to detect prohibition law violators.[21] By contrast, in 1924 Attorney General Stone prohibited wiretapping by personnel of the Department of Justice.[22] Four years later, in *Olmstead* v. *United States*, 277 U.S. 438 (1928), the Supreme Court held that the fourth amendment did not prohibit wiretapping without a warrant unless there was a physical trespass on the defendant's property. Without an invasion of property rights there was no "search"; [23] furthermore, telephone conversations were held not to lie within the protection against unreasonable seizure.[24] The opinion of the Court observed, however, that Congress could enact legislation to protect the confidentiality of telephone messages by making intercepted conversations inadmissible in evidence in Federal criminal trials.[25]

Congress responded to this suggestion by enacting § 605 of the Federal Communications Act of 1934, which provides in pertinent part: [26]

> [N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person.

It will be observed that § 605 absolutely prohibits all wiretapping, with or without a warrant. The Supreme Court held in the two *Nardone* decision [27] that Federal agents were included within the proscription of § 605 and that evidence obtained through the use of a telephone wiretap was inadmissible in criminal proceedings in Federal courts.

Despite the clear statutory prohibition, the Department of Justice continued to employ wiretapping, although of course it was no longer possible to introduce the intercepted conversations in evidence. The practice was defended on the ground that § 605 did not impose a ban on interception per se, but only prohibited interception and divulgence; and that disclosure within the executive branch did not constitute divulgence.[28] However, in 1940 Attorney General Jackson announced that wiretapping would no longer be used as an investigative tool by the Department of Justice, and that cases based on such evidence would not be prosecuted.[29]

Two months later, Jackson received a confidential memorandum from President Roosevelt which directed him "to secure information

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[21] Westin, The Wire Tapping Problem: An Analysis and a Legislative Proposal, 52 Colum. L. Rev. 165, 172 (1952).

[22] In keeping with this prohibition, the Manual of Rules and Regulations of the [Federal] Bureau of Investigation (issued March 1, 1928) stated:

> Unethical tactics: Wiretapping, entrapment, or the use of any other improper, illegal or unethical tactics in procuring information in connection with investigative activity will not be tolerated by the Bureau.

[23] 277 U.S. at 464–65.

[24] Id. 466.

[25] Id. 465–66.

[26] 48 Stat. 1103 (1934), as amended 47 U.S.C. § 605 (1970).

[27] *Nardone* v. *United States*, 302 U.S. 379 (1937); *Nardone* v. *United States*, 308 U.S. 338 (1939).

[28] For example, Confidenutial memorandum for the Director of the FBI from Attorney General Biddle, October 9, 1941, describing the longstanding practice of the Department of Justice. The statutory construction adopted by the Department flatly contradicted the *Nardone* decisions, in which the Supreme Court held that "the plain words of § 605 forbid anyone, unless authorized by the sender, to intercept a telephone message * * *" 302 U.S. at 382. Significantly, other Federal agencies (such as the Treasury Department and the Federal Communications Commission) did not share the Department of Justice's interpretation of § 605. Donnelly, Comments and Caveats on the Wire Tapping Controversy, 63 Yale L.J. 799, 802 (1954).

[29] Press statement of the Department of Justice, released March 18, 1940, dated March 15, 1940. Attorney General Jackson's prohbition of wiretapping by the Department of Justice was based on his belief that wiretapping was prohibited by § 605, as interpreted by the Supreme Court, and that new legislation would be required to authorize even limited use of wiretapping. See, letter from Jackson to Representative Celler, dated May 31, 1940; H.R. Rept. No. 2574, 76th Cong., 3d sess. (1940).

by listening devices directed to the conversations or other communications of persons suspected of subversive activities against the Government." [30] From the language elsewhere in the memorandum it appears that Roosevelt was very reluctant to take this step. He began by stating that "under ordinary and normal circumstances wiretapping by Government agents should not be carried on for the excellent reason that it is almost bound to lead to abuse of civil rights." [31] He was persuaded to his decision, however, by "grave matters involving the defense of the Nation:" [32] the outbreak of war and the fact that other nations were engaging in sabotage, assassination, and fifth column activities. As one commentator has suggested:

> There is no indication that Roosevelt thought the practice would continue after the war, and certainly none that it would ever be used to justify the surveillance of purely domestic political organizations. In fact, Roosevelt ended his memorandum with the request that these investigations be kept to a minimum and limited, insofar as possible, to aliens.[33]

The termination of the war did not bring an end to Roosevelt's wiretapping program. On the contrary, in 1946 Attorney General Tom Clark secured President Truman's approval of a new, expanded wiretap policy for the Department of Justice. Clark justified the policy by alluding to "the present troubled period in international affairs, accompanied as it is by an increase in subversive activities here at home * * * [and] a very substantial increase in crime." [34] Accordingly, he recommended that the use of wiretapping be enlarged to include "cases vitally affecting the domestic security, or where human life is in jeopardy." [35] The new policy was inconsistent with Roosevelt's understanding that wiretapping was justified soley by the war emergency and should be restricted to aliens; yet Clark later insisted that "there has been no new policy or procedure since the initial policy was stated by President Roosevelt." [36]

Clark's policy was continued in force by his successors, Attorneys General McGrath, McGranery, and Brownell.[37] Like Clark, McGrath declared that the Department of Justice wiretapping policy had not change since Roosevelt's 1940 directive.[38] During this period of widespread concern over Communist infiltration, the use of wiretapping was primarily focused on what were perceived as internal security threats. In arguing for new legislation, Brownell expressed the Department's dissatisfaction with the exclusionary rule of § 605:

> [H]ow can we possibly preserve the safety and liberty of everyone in this nation unless we pull federal prosecuting attorneys out of their straitjackets

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[30] Confidential memorandum for the Attorney General from President Roosevelt, May 21, 1940.
[31] *Id.*
[32] *Id.*
[33] NOTE, Privacy and Political Freedom: Application of the fourth amendment to "National Security" Investigations, 17 U.C.L.A. L. Rev. 1205, 1222 (1970). The author observes that Roosevelt's memorandum was directed toward national defense vis-a-vis the activities of other nations and clearly did not contemplate surveillance of domestic organizations. The same conclusion is drawn by Justice Powell in *United States* v. *U.S. District Court*, 407 U.S. 297, 310 n. 10 (1972).
[34] Memorandum from the Office of the Attorney General to President Truman, July 17, 1946.
[35] *Id.*
[36] Press statement of the Department of Justice, March 31, 1949.
[37] Theoharis and Meyer, The "National Security" Justification for Electronic Eavesdropping: An Elusive Exception, 14 Wayne L. Rev. 749, 762–63 (1968); Brownell, The Public Security and Wire Tapping, 39 Cornell L.Q. 195, 199–200 (1954); Rogers, The Case for Wire Tapping, 63 Yale L.J. 792, 795–96 (1954).
[38] Theoharis and Meyer, *supra* note 37, at 763.

and permit them to use intercepted evidence in the trial of security cases and other heinous offenses such as kidnapping?[39]

In the 1960's the primary emphasis shifted from espionage and subversion to organized crime. Wiretap bills introduced in Congress in 1961 and 1962, in addition to authorizing wiretapping in cases involving treason, sabotage, espionage, and the like, further extended the proposed coverage to murder, kidnapping, extortion, and narcotics offenses.[40] In practice if not in theory, organized crime came to be regarded as an element of national security,[41] although Attorney General Ramsey Clark rejected this view during Senate hearings in 1967.[42]

The 30-year history of warrantless national security wiretapping under successive Presidents and Attorneys General is sometimes cited on the theory that long usage is a justification for the continuation of the practice. While this consideration may deserve some weight, three points emerge from the foregoing review which tend to discount the precedential value of past practice. First, during the period from 1934 to 1968 (when it was superseded by title III), § 605 absolutely prohibited either interception or divulgence of telephone messages.[43] Even assuming arguendo that Roosevelt's limited wiretapping program was justified by the war emergency,[44] that rationale disappeared when the war ended in 1945. No wiretapping conducted by the Department of Justice from 1945 to 1968, therefore, would be legitimized on this rationale.

Second, until *Olmstead* was overruled in 1967,[45] wiretapping was not considered to fall within the purview of the fourth amendment. Thus if § 605 had not existed, not only would wiretapping have been legal but also it would not have been subject to any warrant requirement. For this reason it is unimportant that the 1940–67 wiretapping was warrantless.

Third, the meaning of "national security" during the period from 1940 to the present has fluctuated dramatically in response to changing public attitudes, which tends to diminish the precedential value of prior practice with respect to national security wiretapping.

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[39] Brownell, *supra* note 38, at 201.

[40] Hearings on S. 2813 and S. 1495 before the Senate Committee on the Judiciary, 87th Cong., 2d sess. (1962).

[41] In a 1966 memorandum to the Supreme Court, then Solicitor General Thurgood Marshall wrote:

> [C]ontinuing into 1965 the director of the Federal Bureau of Investigation was given authority to approve the installation of devices * * * when required in the interest of internal security or national safety including organized crime, kidnapping and matters wherein human life be at stake.

Supplemental memorandum for the United States to the U.S. Supreme Court in hearings on S. 928 on Right of Privacy Act of 1967 before the Subcommittee on Administrative Practices and Procedure of the Senate Committee on the Judiciary, 90th Cong., 1st sess., pt. 1, at 34 (1967). [Emphasis supplied.]

[42] Hearings on S. 928 before th Subcommittee on Administrative Practices and Procedure of the Senate Committee on the Judiciary, 90th Cong., 1st sess., at 51 (1967).

[43] See, e.g., NOTE, Privacy and Political Freedom: Application of the fourth amendment to "National Security" Investigations, supra, note 34, at 1220–21 (1970); Donnelly, Comments and Caveats on the Wire Tapping Controversy, 63 Yale L.J. 799, 800–03 (1954).

[44] In his directive of May 21, 1940, Roosevelt explicitly acknowledged the holdings of the *Nardone* decisions, supra note 27. He admitted that the Supreme Court was right that "under ordinary and normal circumstances" Government wiretapping should be banned, but he urged:

> However, I am convinced that the Supreme Court never intended any dictum in the particular case which it decided to apply to grave matters involving the defense of the nation.

[45] *Katz* v. *United States*, 389 U.S. 347 (1967); see discussion, *infra*.

## 2. FACTS [46]

In May 1969, the President authorized a wiretapping program in an effort to discover the source of leaks of classified Government material relating to foreign policy. Under this program, which remained in effect until February 1971, wiretaps were instituted against seven National Security Council (NSC) employees, three employees of Government agencies, three White House staff members, and four newsmen.

Table 1 on the following page presents in schematic form the basic information about the 1969–71 wiretaps (book VII, 141–373).

TABLE 1.—1969–71 WIRETAPS

| Designation | | | Authority for tap | Request conveyed by— | Date | | |
|---|---|---|---|---|---|---|---|
| HJC | President | Job description | | | Requested | Installed | Discontinued |
| B | W | NSC | Highest [1] | Haig | May 10, 1969 | May 12, 1969 | June 20, 1969 |
| | | | | Haldeman | Oct. 15, 1970 | Oct. 19, 1970 | Feb. 10, 1971 |
| G | M | DOD [Pursley] | do | Haig | May 10, 1969 | May 12, 1969 | May 27, 1969 |
| | | | Nixon | do | May 2, 1970 | May 4, 1970 | Feb. 10, 1971 |
| N | L | NSC [Halperin] | Highest | do | May 10, 1969 | May 12, 1969 | Do. |
| O | X | NSC | do | do | do | do | Sept. 15, 1969 |
| C | | NSC | do | do | May 20, 1969 | May 20, 1969 | June 20, 1969 |
| I | | NSC | do | do | do | do | Do. |
| P | Y | Newsman | do | do | May 28, 1969 | May 29, 1969 | Feb. 10, 1971 |
| D | Q | do | [2] | do | June 4, 1969 | June 4, 1969 | Aug. 31, 1969 |
| E | | White House | Nixon | Mitchell | July 23, 1969 | July 23, 1969 | Oct. 2, 1969 |
| F | | do | Highest | Haig | Aug. 4, 1969 | Aug. 4, 1969 | Sept. 15, 1969 |
| M | | Newsman (TV) | Nixon | Mitchell | Sept. 10, 1969 | Sept. 10, 1969 | Nov. 4, 1969 |
| Q | N | Newsman [Beecher]. | do | Haig | May 2, 1970 | May 4, 1970 | Feb. 10, 1971 |
| A | | State Deparrment | do | do | do | do | Do. |
| H | | do | do | do | do | do | Do. |
| K | | NSC | [2] | do | May 12, 1970 | May 13, 1970 | Do. |
| L | S | NSC | [2] | do | do | do | Do. |
| J | | White House | | Haldeman | Dec. 14, 1970 | Dec. 14, 1970 | Jan. 27, 1971 |

[1] "On the highest authority."

[2] Memoranda from F.B.I. Director Hoover to Attorney General Mitchell state that these wiretaps were requested by Kissinger. (book VII, 196, 197, 241). However, Kissinger has denied making these requests.

The 17 persons who were wiretapped are listed in the chronological order in which the wiretaps were authorized. For the sake of confidentiality, each person is designated by a code letter rather than his name. Code letters under the heading "HJC" are the designations used in book VII of the "Statement of Information" prepared by the Committee on the Judiciary; code letters under the heading "Pres." are the corresponding designations used in book IV of the "Statement of Information Submitted on Behalf of President Nixon." Unless otherwise indicated, references to these persons in the following discussion of the facts will use the "HJC" designations. It will be observed that table 1 indicates the names of three of the 17 persons. In these three cases, the identity of the person is now a matter of public knowledge:

[46] *Citation of Sources.*—Within this section sources are cited in parentheses rather than in footnotes and the following abbreviations are used:

Book VII. 158—"Statement of Information," hearings before the Committee on the Judiciary, House of Representatives, 93d Cong., 2d sess., pursuant to H. Res. 803, book VII. p. 158 (May–June 1974).

Source material not included in these published statements is cited in full to the particular source. It should be noted that neither published statement contains all the material previously presented to the committee. In particular, the summaries of FBI letters which originally appeared at paragraphs 7.1, 9.2, 11.1 and 13.1 of book VII have been extensively edited for publication; and paragraph 26 has been entirely omitted from the "Statement of Information Submitted on Behalf of President Nixon," book IV.

Gen. Robert Pursley (book VII, 299); Morton Halperin (book VII, 325–33); and William Beecher (book VII, 142, 242, 327). Table 1 also includes a job description for each of the 17 persons; the abbreviation "NSC" is used for National Security Council, and "DOD" for Department of Defense.

In each case the decision to initiate a wiretap originated at the White House; this fact is reflected in table 1 in the column entitled "Authority for Tap." It will be observed that many of the wiretaps were simply ordered "on the highest authority." The procedure was to transmit the original request to the FBI; the identity of the official who actually made this contact with the FBI is given under the heading "Request Conveyed." In each case FBI Director Hoover then wrote to Attorney General Mitchell requesting written authorization for the particular wiretap, and in each case Mitchell authorized the wiretap (book VII, 158). (The Attorney General's authorization, a pro forma approval, should not be confused with the original decision to undertake the wiretap.) In no case was a court order applied for or obtained. (Elliot Richardson testimony, Senate Foreign Relations Committee executive session, September 10, 1973, 279; unpublished material from book VII, paragraph 3.3.)

The original justification for the wiretapping program was a series of newspaper articles in the spring of 1969, apparently based on leaks by persons having access to classified materials relating to foreign policy (book VII, 147). In particular, the following news accounts were based on classified information whose premature publication allegedly had a damaging effect on the conduct of international diplomacy and foreign relations:

(1) Articles on April 1 and April 6 indicating that the United States was considering unilateral withdrawal from Vietnam. "Statement of Information Submitted on Behalf of President Nixon," (Book IV, 139–51.)

(2) An article on May 1 reporting strategies under consideration for the SALT negotiations. (Id. Book IV, 167–72.)

(3) An article on May 9 reporting secret bombing raids in Cambodia. (Id. Book IV, 161–65.)

(4) An article on June 3 reporting that the President had determined to remove nuclear weapons from Okinawa. (Id., book IV, 179–82.)

(5) Articles on June 3 reporting the decision to begin troop withdrawals from Vietnam. (Id. Book IV, 153–59.)

President Nixon has unequivocally stated that the orders to initiate and carry out the wiretap program were his. In his statement of May 22, 1973 the President said:

> [A] special program of wiretaps was instituted in mid-1969 and terminated in February 1971. . . . I authorized this entire program. Each individual tap was undertaken in accordance with procedures legal at the time and in accord with longstanding precedent (book VII, 147).

In a letter of July 12, 1974 to Senator Fulbright, chairman of the Senate Committee on Foreign Relations, President Nixon affirmed his earlier statement and added (emphasis supplied):

> The circumstances that led to my decision to direct the initiation of an investigative program in 1969 are described in detail in the May 22 statement. I ordered the use of the most effective investigative procedures possible, including

wiretaps, to deal with certain critically important national security problems. Where supporting evidence was available, I personally directed the surveillance, including wiretapping, of certain specific individuals.

I am familiar with the testimony given by Secretary Kissinger before your Committee to the effect that he performed the function at my request, of furnishing information about individuals within investigative categories that I established so that an appropriate and effective investigation could be conducted in each case. This testimony is entirely correct; and I wish to affirm categorically that Secretary Kissinger and others involved in various aspects of this investigation were operating under my specific authority and were carrying out my express orders.

The President's statement that he "personally directed the surveillance * * * of certain specific individuals" is corroborated by other evidence. According to Mitchell, the President ordered not only a wiretap but also 24-hour physical surveillance of E, "because he wanted 'to set E up' and planned to send material from Guam * * * which E would definitely see" (book VII, 205, 269). Mitchell also told the FBI that the President wanted immediate coverage on M. (Book VII, 206.) The wiretaps initiated in May 1970 on Q, G, H, and A were requested of the FBI by General Haig "on behalf of the President," who had apparently called Haig to advise him of the need for action (book VII, 294).

President Nixon stated that he believed that his actions in carrying out the wiretapping program were legal. His own statement of May 22, 1973 in this regard (book VII, 147) is amplified by Secretary Kissinger's affidavit in *Ellsberg* v. *Mitchell:*

The President was told by Mr. Hoover that the most effective method was that which had been followed in previous Administrations, namely the conduct of electronic surveillance in accordance with specified procedures. The President was assured by Attorney General Mitchell that such action would be in compliance with law, ("Statement of Information Submitted on Behalf of President Nixon," book IV, 149.)

However, Mitchell has denied that he was consulted when the wiretapping program was initiated. According to Mitchell, the first he heard of the wiretaps was sometime in 1969 when FBI Director Hoover told him that the surveillance was being conducted. Mitchell recalled a later discussion between himself, Haig, and/or Kissinger, in which they agreed the wiretaps could become "explosive" and that the whole operation was "a dangerous game were were playing" (book VII, 160).

With respect to the President's opinion as to whether or not the wiretapping program was legal, it may be of evidentiary significance that unlike other national security wiretaps, the 1969–71 wiretaps were not entered in the FBI indices. The files and logs of the wiretaps were maintained only in the offices of FBI Director Hoover or Assistant Director Sullivan, and no copies were made. This procedure was requested by Haig when the program began (book VII, 181–90). Similarly, it may be of evidentiary significance that in July 1971, after the termination of the wiretap program, the President directed Asst. Atty. Gen. Robert Mardian to obtain the files of the wiretaps from the FBI and to deliver them to John Ehrlichman at the White House (book VII, 755–88). Another possible motivation for obtaining these materials may have had to do with the possibility, suggested to Mardian by Assistant to the Director Sullivan, that FBI Director Hoover might use them to "blackmail" the President (book VII, 757).

The President's statement of May 22, 1973, also explained the general rationale or justification for the various wiretaps:

Those wiretapped were selected on the basis of access to the information leaked, material in security files, and evidence that developed as the inquiry proceeded (book VII, 147).

The justification for each particular wiretap must be sought in the factual circumstances. In the extended discussion which follows, attention will first be directed to the reasons for the initiation of each wiretap, and then to the reasons for the continuation or termination of each wiretap.

The first wiretaps were those placed on B, G, N, and O on May 12, 1969, and those placed on C and I on May 20, 1969. Reference has already been made to the series of newspaper articles apparently based on leaks in the spring of 1969; the article which triggered this first group of wiretaps was written by Q and appeared in the New York Times on May 9, 1969. (Book VII, 142; "Statement of Information Submitted on Behalf of President Nixon," book IV, 162.) The request for wiretaps on these six persons was conveyed to the FBI by then Colonel Haig, who stated that the request was made "on the highest authority" and involved "a matter of most grave and serious consequence to our national security;" no other rationale was offered for the wiretaps (book VII, 192–95, 203).

B was an NSC staff member detailed to that assignment from the State Department; he was suspected by the FBI of having leaked classified information in the mid-1950's and early 1960's (book VII, 192–93). G was Gen. Robert Pursley, military assistant to Secretary of Defense Melvin Laird, who later described him as "a very fine military officer, and [one in whom] I have complete and total confidence;" as of May 1969, the FBI had nothing on G in its files (book VII, 192, 298–300). Like B, O was an NSC staff member detailed from the State Department. At one point he had been assigned to the Paris Peace Conference and while there had leaked information about the conference to newspapers; but he had stopped after being warned (book VII, 192). C was also an NSC staff member formerly with the State Department; FBI investigations of C in 1951, 1961, and 1969, revealed "no pertinent derogatory information of a security nature" (book VII, 194–95). "I" was an NSC staff member who had previously been employed by the NSC some years before; as in the case of C, FBI investigations of I in 1966 and 1969 disclosed "no unfavorable information of a security nature" (book VII, 194).

N was Morton Halperin, whose wiretap has achieved a measure of notoriety because he has filed an action under 18 U.S.C. § 2520 against Secretary Kissinger and various other defendants; *Halperin* v. *Kissinger*, Civil No. 1187–73 (D.D.C., filed June 14, 1973). Kissinger's affidavit in *Ellsberg* v. *Mitchell* stated that as of May 9, 1969, Halperin was Chief of the NSC Planning Group; that he was involved in the preparation of NSC policy reviews, regularly participated in sensitive NSC studies, attended NSC Review Group meetings which discussed Vietnam, the SALT talks, et cetera, and regularly received cables and intelligence reports; and that he was "unquestionably one of several persons who had had access to such information" as had been leaked to Q regarding the secret bombing of Cambodia. Halperin's position gave him "access to fundamental policy issues during the formative and crucial early months of 1969." ("Statement of Information Submitted on Behalf of President Nixon," book IV, 149–50.)

Halperin's affidavit in *Halperin* v. *Kissinger* offers a somewhat different perspective. According to the affidavit, Kissinger told him on May 9, 1969, that he was suspected of being the source of the leak to Beecher (Q); as a prophylactic measure, therefore, Kissinger deprived him of access to sensitive material as of that date. Halperin claimed that he could not have been the source of the leak because, as Kissinger well knew, he had not had access to any documents relating to the Cambodian bombing. (A number of other officials had had access but were not wiretapped) (book VII, 327–29).

Halperin was also suspected because of his background. He was a "carryover" from the Johnson administration and was characterized in an FBI memorandum as an "arrogant Harvard-type Kennedy man" and a member of the "Harvard clique." Although he had had contact with Soviet nationals, an FBI investigation of uncertain date had revealed no "pertinent derogatory information." Other FBI investigations in 1962 and 1969 showed that Halperin thought that the U.S. leadership had erred in making the Vietnam commitment; in 1965 he had agreed to sponsor a national sitin having to do with Vietnam. Halperin was a senior staff member of the NSC, to which he had been detailed from the Department of Defense where he held a position with the Systems Analysis Agency. (Book VII, 144–45, 160, 192, 203.)

In spite of the foregoing, FBI Director Hoover regarded the allegation that N was responsible for the leaks as "speculation" without any proof. Furthermore, Hoover noted that:

> * * * in the Systems Analysis Agency in the Pentagon, there are at least 110 of the 124 employees who are still McNamara people and express a very definite Kennedy philosophy.
>
> Q freqeunts this office as well as the National Security Council, and the employees freely furnish him information (book VII, 143).

The six persons originally wiretapped (B, G, N, O, C, and I) comprise a group of Government employees, five of whom were with the NSC and all of whom might arguably have had access to information forming the basis of Beecher's newspaper article of May 9, 1969.

After this initial group, however, the pattern of wiretapping became somewhat less predictable. Between May 29, and September 10, 1969, five new names were added to the list of persons wiretapped. Three were newsmen (P. D, and M) and two were White House staff members (E and F). The fourth newsman, Beecher, was not wiretapped until May 1970. For purposes of analysis, however, the four newsmen will be considered as a group.

The wiretap on P was installed on May 29, 1969, and maintained until February 10, 1971, making his the longest surveillance except for Halperin's. An internal memorandum of July 8, 1969 indicates that the FBI regarded P as a man with a great many high level contacts, and the most likely suspect after Halperin. (Unpublished material from book VII, sec. 15.1). It appears that he was not an American citizen; and that he had frequent contact with the Soviet embassy in Washington. (Unpublished material from "Statement of Information Submitted on Behalf of President Nixon," book IV, 5–6, 8). P's close personal friendship with F is remarked on several occasions. (Book VII, 206, 267; unpublished material from book VII, secs. 9.2, 11.1.) He was also a close personal friend of Kissinger, who testified before the Senate Foreign Relations Committee that he frequently talked to P on the telephone. Kissinger was surprised to

learn that P had been wiretapped because P's news stories rarely included leaked material, and because P had not been particularly critical of the Nixon administration (book VII, 247). (For other reasons why P was wiretapped, see unpublished material from book VII, secs. 8.1, 8.4, 9.2, 15.1; unpublished material from "Statement of Information Submitted on Behalf of President Nixon," book IV, sec. 26(c), 5–6).

D, another newsman, was first wiretapped on June 4, 1969, in response to a request from Kissinger; the rationale for the wiretap was that D had been in contact with other persons already under surveillance, notably O. (Book VII, 206, 241; unpublished material from book VII, sec. 9.2.) At the time when the wiretap was placed, the FBI files contained "no pertinent information of an internal security nature concerning [D]" (book VII, 241).

M was a television reporter as to whom President Nixon requested both a wiretap and physical surveillance (the latter, however, was not performed) (book VII, 206, 243). According to the FBI, M had previously worked abroad in several countries, including the Soviet Union. M had had certain contacts with various Soviet bloc personnel. During a 1967 interview with the FBI he volunteered those contacts and indicated that he was unaware that any of them had intelligence significance, but that if such a contact should occur he would promptly notify the FBI. (Unpublished material from book VII, secs. 8.2, 10.2.) The wiretap on M was installed in September 1969.

Q is known to be William Beecher of the New York Times (book VII, 142, 242, 327). His article of May 9, 1969, about the Cambodian bombing triggered the wiretapping program. ("Statement of Information Submitted on Behalf of President Nixon," book IV, 161–65; book VII, 142, 299–300.) According to an internal FBI memorandum, Beecher knew Halperin and another NSC member, and was considered to be part of the Harvard clique. This connection, coupled with what the FBI characterized as the Kennedy bias of the Systems Analysis Agency of DOD, made it very easy for Beecher to obtain information. Conversely, he was the Times' regular Pentagon reporter and was described as "particularly astute as to military affairs." In 1966 the FBI investigated Beecher in connection with an article he had written about the antimissile field, but came to the conclusion that his story was probably not based on leaks but on informed speculation (book VII, 143–45, 203, 206, 294). As for the source of Beecher's first Cambodia article, Secretary of Defense Laird described how Beecher actually learned about the bombing:

> Now the Beecher story was written on the basis of a story that appeared in the London Times some 48 hours before he wrote. A correspondent had flown over the border and he saw certain craters in Cambodia and the London Times came out with this particular story. Bill Beecher, being an interprising young reporter went and started checking this out . . . (book VII, 300).

Curiously, Beecher was not wiretapped in connection with his article of May 9, 1969, about the Cambodian bombing. Rather, it was an article which he wrote a year later about the invasion of Cambodia which prompted President Nixon to order a wiretap on Beecher. According to Haig, the President called him on or just before May 3, 1970, concerning a "serious security violation involving a leak by [Beecher] concerning the Cambodian situation." Haig explained to the FBI that this leak had been "nailed down to a couple of people," and he requested "on behalf of the President" that wiretaps be placed on

Beecher, Pursley, and two State Department officers designated A and H (book VII, 294, 295, 297). It will be recalled that Pursley had been wiretapped previously in connection with Beecher's article of May 9, 1969; but that wiretap, installed on May 12, 1969, was terminated after only 15 days (book VII, 204, 326).

A and H were both State Department employees on the ambassadorial level (book VII, 302, 304). H was described by Kissinger as "the focal point for NSC documents in the Department of State" (book VII, 264). Beyond this information, there is no further indication of why A and H were wiretapped. In both cases the wiretap was installed on May 4, 1970, and continued until all the wiretaps were terminated on February 10, 1971. (There is a minor factual discrepancy on this point in the T. J. Smith memorandum of May 13, 1973, book VII, 204, where it is stated that the wiretap on A was first approved on October 19, 1970. This date is contradicted by the weight of the evidence; book VII, 205, 294, 297.) An innovation in the wiretaps of Beecher, Pursley, A and H was that for the first time the offices as well as the homes of the suspects were wiretapped (book VII, 206).

The invasion of Cambodia in May 1970 also precipitated the surveillance of K and L, two additional NSC staff members who had not previously been wiretapped. Both of these persons were opposed to the administration's Cambodia policy (book VII, 196–97). Apart from evidence that he was dissatisfied with his job because of the events in Cambodia, there is no indication of why K was wiretapped. The circumstances surrounding the wiretap on L, however, are more fully elaborated in the following excerpt from Kissinger's testimony before the Senate Foreign Relations Committee:

> L was my personal assistant, who knew everything in my office, who had been with me on secret negotiations with Le Duc Tho and who literally before whom I had no secrets, a man for whom I had then and for whom I continue to have the highest personal regard . . . .
>
> L resigned early—during the Cambodian incursion in protest against the governmental policy. On the other hand, for financial and other reasons he was not prepared to leave his office right away . . . .
>
> [S]o we had a potential security problem here in the sense that a man had resigned in strong opposition to the President's policy but was still continued on the staff in a sensitive position and, morever, still had all the files.
>
> Now, I would not have remembered that I personally, that it was at my personal direction and I think again this may well have been an F.B.I. euphemism but this was the reasoning that lead to the tapping of L (book VII, 214–15).

In summary, just as a group of six persons (B, G, N, O, C, and I) had been wiretapped in connection with the leaks in the spring of 1969 (particularly Beecher's article), so was another group of six persons (Q, G, A, H, K, and L) placed under electronic surveillance a year later in connection with their opposition to the invasion of Cambodia. In all six cases the wiretaps were installed in early May of 1970 and continued until all wiretaps were termined on February 10, 1971.

The remaining three persons who were wiretapped (E, G, and J) were White House staff members, but the justification for the wiretap appears to have been different in each case. E and F were placed under surveillance in the late summer of 1969 for about 2 months each; J was wiretapped for a month and a half from December 1970 to January 1971.

E was an aide to John Ehrlichman, the President's legal counsel. His position involved him with domestic affairs exclusively; he had no foreign policy or national security responsibilities. A Time magazine article reported that he had originally thought that he would be close to the President, but found that he was overshadowed by Ehrlichman and H. R. Haldeman (book VII, 205, 261–62, 269–70). A newspaper story in the same vein included E in a group of bright young men being shunted aside in the Nixon administration. (Unpublished material from book VII, Sec. 11.1.) With regard to the wiretapping of E, an internal FBI memorandum stated:

> The AG [Mitchell] inquired as to whether I was familiar with the "wiretapping business at the White House." I answered in the affirmative. He then asked me if I had heard the name of E . . . He then added that the President was extremely exercised and very aggravated over this matter. He stated the President wanted "to set E up" and planned to send material from Guam this coming Thursday night which E would definitely see (book VII, 269).

At the President's request, not only was a wiretap on E installed on July 23, 1969, but he was placed under 24-hour physical surveillance as well (book VII, 269–73, 280).

F was a speechwriter for the President (book VII, 204–05, 265; unpublished material from book VII, secs. 9.2, 11). Prior to the installation of the wiretap there was no apparent reason for placing F under surveillance, although material disclosed in intercepted conversations was used to justify the wiretap in retrospect, as the following excerpt from an internal FBI memorandum indicates.

> With reference to the coverage on F, the rationale used by Colonel Haig was that the coverage on P revealed that P and F were friends and that F told P what would be in a speech by the President (book VII, 206).

In fact, this representation by Haig is not strictly accurate. The wiretaps showed that F agreed to give P some background material prior to a speech by the President, but stated that he would not leak anything in advance. (Unpublished material from book VII, sec. 9.2.)

Like E, J was a White House staff member on the Domestic Council and had "no national security responsibilities," (book VII, 205, 263–64, 282). No rationale is apparent for the wiretap on J, although the intercepted conversations revealed that he was dissatisfied with his job.

Significantly, of the three White House staff members who were wiretapped, two were persons completely unknown to Kissinger. Of E he said: "I did not even know E. In fact, to this day I do not know E." As for J, Kissinger said: "I never even knew J existed" (book VII, 261, 264). Kissinger's ignorance of E and J has been cited by Elliot Richardson as a reason for assuming that they had no access to the leaked materials (book VII, 260).

Since President Nixon was personally responsible for the undertaking of the wiretapping program and intimately acquainted with its objectives, he is the best judge of whether it yielded valuable results. The President has publicly stated that "They [the wiretaps] produced important leads that made it possible to tighten the security of highly sensitive materials" (book VII, 147). However, this statement is directly contradicted by the President's private opinion, expressed in a

conversation with John Dean on February 28, 1973, from which the following excerpt is drawn.

PRESIDENT. * * * Lake and Halperin. They're both bad. But the taps were, too. They never helped us. Just gobs and gobs of material: gossip and bull shitting [unintelligible].

DEAN. Um huh.

PRESIDENT. The tapping was a very, very unproductive thing. I've always known that. At least, I've never, it's never been useful in any operation I've ever conducted. (HJCT 37; book VII, 1754).

The President's conclusion is confirmed by the Department of Justice, which has described the wiretap materials as including no indicated violations of Federal law, nor any specific instance of information being leaked in a surreptitious manner to unauthorized persons (book VII, 208).

In view of the fact that President Nixon has thoroughly discounted the value of the information which the wiretaps yielded, no detailed review of this material will here be undertaken. The significance and sensitivity of the intercepted conversations probably cannot be determined by anyone who is not intimately familiar with U.S. foreign policy plans and programs during the period in question. The actual transcribed conversations fill many thousands of pages; these materials were summarized in the FBI letters which were sent on a regular basis to President Nixon, Kissinger and Haldeman, and summaries of the letters are included among the evidence which has been presented to the House Committee on the Judiciary (book VII, 227–30, 253–56, 280–82, 302–04; but see more complete summaries in unpublished material from book VII, secs. 7.1, 9.2, 11.1, 13.1; unpublished material from "Statement of Information Submitted on Behalf of President Nixon," book IV, sec. 26).

The only instance in which it has been suggested that the wiretapping program served its purpose of uncovering the sources of leaks has to do with the termination of O's employment at the NSC. On May 29, 1969 William Sullivan wrote a letter to FBI Director Hoover to inform him that "they are releasing O today. At least this is one leak that will be stopped." (Unpublished material from "Statement of Information Submitted on Behalf of President Nixon," book IV, sec. 26(k)). In a later letter to Hoover, Sullivan again referred to the "removal" of O from the NSC staff (book VII, 326). It is not clear, however, whether O resigned by choice or was fired for talking to reporters. (Unpublished material from book VII, sec. 7.1; unpublished material from "Statement of Information Submitted on Behalf of President Nixon, book IV, sec. 26(a), p. 10). Kissinger later referred to this incident as "the one instance where ambiguous information was developed." (Kissinger testimony, Senate Foreign Relations Committee Executive Session, Sept. 17, 1973, vol. 1, p. 124.) Kissinger subsequently clarified this statement by declaring that "nobody was penalized as a result of [the wiretapping program]" (book VII, 231).

In spite of the fact that no useful information was derived from the wiretaps, many of them were continued for extended periods of time as indicated in the following table. This fact belies Haig's original assurance that "these surveillances will only be necessary for a few days to resolve the issue" (book VII, 189). Furthermore, although standard Department of Justice procedure required the Attorney General to

review national security wiretaps every 90 days in order to reestablish their necessity, Mitchell undertook no review of any of the wiretaps (book VII, 178).

TABLE 2.—DURATION OF WIRETAPS

| Subject | Dates of wiretap | | Duration | |
|---|---|---|---|---|
| | Installed | Terminated | Months | Days |
| B[1] | May 12, 1969 | June 20, 1969 | 1 | 8 |
| G[1] | do | May 27, 1969 | | 15 |
| D | June 4, 1969 | Aug. 31, 1969 | 2 | 27 |
| E | July 23, 1969 | Oct. 2, 1969 | 2 | 9 |
| F | Aug. 4, 1969 | Sept. 15, 1969 | 1 | 11 |
| M | Sept. 10, 1969 | Nov. 4, 1969 | 1 | 24 |
| J | Dec. 14, 1970 | Jan. 27, 1971 | 1 | 13 |
| O | May 12, 1969 | Sept. 15, 1969 | 4 | 3 |
| B[2] | Oct. 19, 1970 | Feb. 10, 1971 | 3 | 21 |
| G[2] | May 4, 1970 | do | 9 | 6 |
| Q | do | do | 9 | 6 |
| A | do | do | 9 | 6 |
| H | do | do | 9 | 6 |
| K | May 13, 1970 | do | 8 | 27 |
| L | do | do | 8 | 27 |
| P | May 29, 1969 | do | 20 | 11 |
| N | May 12, 1969 | do | 20 | 28 |

Table 2 does not reflect the fact that three of the NSC staff members were wiretapped after they had left their positions with the NSC. Reference has been made to the fact that O resigned or was fired on May 29, 1969; he was wiretapped for 3½ months after leaving the NSC. Halperin was informed by Kissinger on May 9, 1969 that because he was suspected of being a source for the leak to Beecher he would henceforth be deprived of access to sensitive national security materials. Halperin subsequently resigned from the NSC staff on September 19, 1969. From September 21, 1969 until May 4, 1970, he served as a consultant to Kissinger, but had no access to any classified information and was actually employed by the NSC for only 1 day during that period. On May 4, 1970, Halperin resigned as a consultant. He was nevertheless wiretapped until February 10, 1971: 9 months after severing his last connection with the NSC, 17 months after his resignation from the NSC staff, and 21 months after being deprived of access to sensitive national security materials (book VII, 327–30). L announced his resignation from the NSC staff in early May 1970 but did not actually leave until the end of June, after which he was wiretapped for 7 months (book VII, 215–17).

On July 8, 1969—less than 2 months after Halperin had been placed under electronic surveillance—Sullivan addressed a memorandum to FBI Director Hoover which recommended that the wiretap be terminated. Sullivan stated that "nothing has come to light that is of significance from the standpoint of the leak in question," and observed that since O was removed from the NSC staff (on May 29) Halperin had been very guarded in his use of the telephone, suggesting that he knew it was tapped (book VII, 326).

In attempting to understand why these three men were kept under surveillance after they left the NSC, and even after FBI personnel had concluded in one case that further surveillance would be useless, it may be significant that after quitting the NSC Halperin and L both worked as consultants to Senator Edmund Muskie, who was at the time a likely Democratic presidential candidate (book VII, 217, 330). By contrast, after leaving the NSC O took a job in the private sector,

and his wiretap was terminated not long thereafter. (Unpublished material from "Statement of Information Submitted on Behalf of President Nixon," book IV, sec. 26(b).)

It will be recalled that Halperin terminated his consultancy with the NSC on May 4, 1970; and that L announced his resignation from the NSC at the same time. On May 13, 1970, it was decided at a meeting of the President, Director Hoover, and Haldeman that after that date the FBI summaries of wiretap material would no longer be sent to Kissinger or to the President, but would be sent instead to Haldeman (book VII, 369–73). This fact may have evidentiary significance with respect to the reasons for the continuation of the wiretapping program after May 13, 1970.

Eventually Haldeman delegated to his assistant, Lawrence Higby, the job of reading the FBI summaries (book VII, 275). On December 16, 1970, the FBI sent to Higby the second letter concerning the wiretap on J, one of the White House staff members. The letter advised that "no pertinent activity has occurred." Higby informed the FBI that "they desired letters only when pertinent activity occurred" (book VII, 274). Thereafter the summaries of wiretap material on J dealt only with his personal plans and with domestic political matters (book VII, 282). These facts may also have evidentiary significance with respect to the reasons why the wiretapping was being conducted.

Similarly, on another occasion the White House permitted information obtained through a wiretap to be used in connection with political action in opposition to persons critical of the Vietnam policy of the Nixon administration. On December 29, 1969, FBI Director Hoover wrote a letter to President Nixon to inform him that the interception of one of Halperin's telephone conversations revealed that former Secretary of Defense Clark Clifford was preparing an article to be published in Life magazine criticizing the President's conduct of the war in Vietnam. This letter precipitated a concerted effort by White House staff personnel, including Ehrlichman and Haldeman, to "map anticipatory action" and prepare countermeasures against Clifford's article (book VII, 359–68).

### 3. APPLICABLE LAW

#### *A. Statutory Law: Title III*

In the landmark case of *Katz* v. *United States*, 389 U.S. 347 (1967), the Supreme Court unequivocally overruled Olmstead, discarding the trespass doctrine and holding that the fourth amendment governs not only the seizure of tangible objects but extends as well to the interception of oral statements.[47] Henceforth all electronic surveillances would be subject to the warrant requirement of the amendment.[48]

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[47] In fact, Olmstead had been considerably eroded even before Katz. In *Silverman* v. *United States*, 367 U.S. 505 (1961) the Court held that the use of a "spike mike" inserted against a heating duct, though not a technical trespass, was an "actual intrusion into a constitutionally protected area' and thus a violation of the fourth amendment, compare *Clinton* v. *Virginia*, 377 U.S. 158 (1964); but compare *Lanza* v. *New York*, 370 U.S. 139 (1962), holding that a jail is not a constitutionally protected area.

The proposition that the fourth amendment applies only to the seizure of tangible objects was undermined by *Irvine* v. *California*, 347 U.S. 128 (1954); in *Wong Sun* v. *United States*, 371 U.S. 471 (1963), the Court held for the first time that verbal evidence may fall within the scope of fourth amendment protection.

Writing for the Court in Katz, Justice Stewart succinctly disposed of Olmstead with the observation that the "the fourth amendment protects people, not places." 389 U.S. at 351.

[48] The Court expressly reserved judgment, however, on the question "whether safeguards other than prior authorization of a magistrate would satisfy the fourth amendment in a situation involving the national security * * *" 389 U.S. at 358, n. 23.

In order to meet the constitutional requirements for electronic surveillance enunciated in Katz and in *Berger* v. *New York*, 388 U.S. 41 (1967),[49] Congress enacted in the following year title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510–2520 (1968).

Title III has dual purposes: to protect the privacy of wire and oral communications, and to set forth on a uniform basis the circumstances and conditions under which the interception of those communications may be authorized.[50] The basic proposition is established in § 2511(1), which prohibits under pain of criminal penalties the interception, disclosure, or use of all wire or oral communications, except as otherwise specifically provided in title III.[51] The criminal sanction of § 2511(1) is reinforced by the evidentiary sanction of § 2515, which reflects existing law in providing that no communication nor any evidence derived therefrom may be received in evidence "in or before any trial, hearing, or other proceeding," if the disclosure of that information would be in violation of title III. In addition, § 2520 authorizes a civil action by any person whose communication is illegally intercepted, disclosed, or used; and provides for the recovery of actual (or liquidated) and punitive damages.[52]

Although section 2511(1) enacts a general prohibition of electronic surveillance, section 2516 authorizes the interception of particular wire or oral communications under court order pursuant to the authorization of the appropriate Federal, State, or local prosecuting officer. At the Federal level, section 2516(1) provides that the Attorney General, or any Assistant Attorney General specifically designated by him, may

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[49] Berger was decided 6 months before Katz. In Berger the Court held that conversations are protected by the fourth amendment, and electronic interception is a "search". The Court adhered to the "constitutionally protected area" concept of the earlier cases, and found that the New York eavesdropping statute was so broad that it resulted in a trespassory invasion of that area. The majority opinion delineated the following constitutional standards which the statute failed to meet:

(1) Particularity in describing:
  (*a*) The place to be searched;
  (*b*) The person or thing to be seized;
  (*c*) The crime that has been, is being, or is about to be committed; and
  (*d*) The type of conversation sought.
(2) Limitations on the officer executing the eavesdrop order which:
  (*a*) Would prevent his searching unauthorized areas; and
  (*b*) Would prevent further searching after the thing sought was found.
(3) Probable cause for renewal of the eavesdrop order.
(4) Dispatch in executing the eavesdrop order.
(5) Requirement that the executing officer make a return on the eavesdrop order showing what was seized.
(6) A showing of exigent circumstances to overcome the defect of not giving prior notice.

Title III was drafted to meet these standards.

[50] 2 U.S. Code Cong., and Adm. News, 90th Cong., 2d sess. (1968), at 2153.

[51] § 2511(1) explicitly prohibits the interception itself, regardless of whether the intercepted communication is disclosed or used. This eliminates the ambiguity which existed under § 605 of the Federal Communications Act of 1934; see discussion of § 605, pp. 11–17, supra. It will also be observed that while § 605 was addressed only to wiretapping, § 2511(1) applies to both wiretapping and bugging.

§ 2511(2) enumerates three specific exceptions to the prohibition. Interception of communications is not unlawful when performed by telephone operators or Federal Communications Commission employees in the course of their proper duties; nor is it unlawful if the interceptor is a party to the communication, or if one of the parties has consented to the interception.

[52] E.g., *Halperin* v. *Kissinger*, Civil No. 1187–73 (D.D.C., filed June 14, 1973).

authorize an application for an order (i.e., a warrant) authorizing the interception of wire or oral communication.[53]

The application must be made to a Federal district or circuit court judge. Both the application and the decision of the judge whether or not to issue the order must conform to section 2518, discussed below. The order of authorization, if granted, may permit either the FBI or the Federal agency responsible for investigating the particular offense to conduct the surveillance.

Applications may be made only in the investigation of certain major offenses, which are designated in section 2516(1), subparagraphs (a) through (f).

Each offense has been chosen either because it is intrinsically serious or because it is characteristic of the operations of organized crime. Subparagraph (a) includes those offenses that fall within the national security category. It includes offenses involving espionage, sabotage, treason, and the enforcement of the Atomic Energy Act of 1954.[54]

The detailed procedural requirements of title III are set out in section 2518. Paragraph (1) provides that each application shall include the following information: [55]

(a) the identity of the invesetigative or law enforcement officer making the application, and the officer authorizing the applictaion; [56]

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) detail as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous; [57]

(d) a statement of the period of time for which the interception is required to be maintained . . . ;

(e) a full and complete statement of the facts concerning all previous applications . . . involving any of the same persons, facilities or places . . . ;

(f) Where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

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[53] The purpose of this provision is explained in the legislative history:

> This provision centralizes in a publicly responsible official subject to the political process the formulation of law enforcement policy on the use of electronic surveillance techniques. . . . Should abuses occur, the lines of responsibility lead to an identifiable person. This provision in itself should go a long way toward guaranteeing that no abuses will happen.

2 U.S. Code Cong. and Adm. News, 90th Cong., 2d sess. (1968), at 2153.

The importance which Congress attached to this provision was recently emphasized by the Supreme Court in *United States* v. *Giordano*, No. 72–1057 (U.S. May 13, 1974), which affirmed the granting of a motion to suppress certain wiretap evidence. The application for the wiretap order was purportedly authorized by a specially designated Assistant Attorney General; in fact, it had been authorized by the Executive Assistant to then Attorney General Mitchell. The majority opinion stated that "the mature judgment of a particular, responsible . . . official is interposed as a critical precondition to any judicial order." *Id.* at 9. It was also observed that the Attorney General and Assistant Attorneys General are appointed by the President subject to Senate confirmation, and are therefore responsive to the political process—unlike the Executive Assistant. *Id.* at 14 and n. 9.

[54] 2 U.S. Code Cong. and Adm. News, 90th Cong., 2d Sess. (1968), at 2153. The criminal offenses listed in the other subparagraphs reflect the fact that "the major purpose of [T]itle III is to combat organized crime." *Id.* 2157.

[55] *Cf.* Fed. R. Crim. P. 41, "Search and Seizure." § 2518(1) embodies the standards delineated in *Berger* v. *New York*.

[56] *Cf.* § 2516(1) *supra* note 53; § 2518(4)(d).

[57] Congress intended this statement to be more than a pro forma allegation: "[t]hese procedures were not to be routinely employed as the initial step in criminal investigation." *United States* v. *Giordano*, No. 72–1057 at 9 (U.S. May 13, 1974). Similarly, § 2518(2) provides that the judge may require the applicant to supply additional evidence in support of the application.

Paragraph (3) of Section 2518 describes the findings of probable cause which the judge must make before he can issue an order. He must determine, on the basis of the facts submitted by the applicant, that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit an offense enumerated in § 2516;
(b) there is probable cause for belief that particular communications concerning that offense will be obtained through interception;
(c) normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried, or to be too dangerous;
(d) there is probable cause for belief that the facilities or place of interception are or are about to be used by the suspect in connection with the commission of the offense.

Paragraph (4) requires each order which authorizes an interception to specify the following information:

(a) the identity of the person, if known, whose communications are to be intercepted;
(b) the nature and location of the communications facilities as to which authority to intercept is granted;
(c) a particular description of the type of communication sought to be intercepted, and the particular offense to which it relates;
(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and
(e) the period of time during which interception is authorized . . . .

Paragraph (5) provides that no order may authorize the interception of wire or oral communications for a period of time longer than necessary to achieve the approved objective, and in no event longer than 30 days.[58] When it is necessary to conduct surveillance for a period of time longer than originally specified, Section 2518(5) provides for extensions of up to 30 additional days. Each request for an extension is treated like a new application for an order, and requires a new showing of probable cause.

Paragraph (6) sets out a procedure for periodic judicial supervision during the period of surveillance. The order may require periodic progress reports to be submitted to the judge, who may discontinue the surveillance whenever he feels that the need is no longer established. "This provision will serve to insure that [surveillance] is not unthinkingly or automatically continued without due consideration." [59]

Paragraph (7) provides for an emergency procedure for cases in which the need for surveillance is so immediate that the delay involved in obtaining a court order would be fatal. Section 2518(7) reflects existing law, which recognizes a limited class of exceptions to the warrant requirement for search and seizure (*e.g.*, no warrant is required for a search incident to a valid arrest). Under section 2518(7), however, an application for an order retrospectively approving the interception must be made within 48 hours after the interception has begun to occur.

Paragraph (8) sets out safeguards designed to insure that accurate records will be kept of intercepted communications. As soon as the period of an order has expired, the recordings shall be made available to the judge and sealed under his directions. Custody of the recordings

[58] The New York easesdropping statute held unconstitutional in *Berger* v. *New York* provided for an initial authorization period of 60 days, and permitted extension of indefinite length "on a mere showing that such extension is 'in the public interest'." 388 U.S. at 59.
[59] 2 U.S. Code Cong. and Adm. News, 90th Cong., 2d sess, 1968 at 2153.

shall be wherever the judge orders. Similarly, applications made and orders granted under title III shall also be sealed by the judge in order to preserve their confidentiality.

Finally, section 2517 authorizes the disclosure and use of intercepted communications in specified circumstances. Section 2517(1) authorizes any investigative or law-enforcement officer (including a prosecuting attorney) to disclose the contents of an intercepted communication to another such officer.[60] Section 2517(2) provides that any investigative or law-enforcement officer who by proper means has obtained knowledge of the contents of an intercepted communication "may use such contents to the extent such use is appropriate to the proper performance of his official duties."

From the foregoing outline of the important provisions of title III, it is obvious that the 1969–71 wiretaps conducted by the Nixon administration almost wholly failed to comply with the statutory requirements.[61] For example, no attempt was made even to satisfy the basic requirement of a court order authorizing the wiretaps. This disregard of title III was predicated on a dual assumption: First, that the wiretaps in question were all "national security" wiretaps; and second, that the provisions of title III are inapplicable to "national security" wiretaps.

The first assumption must be tested against the facts of the case.[62] The second assumption is based on section 2511(3), a critical section of title III which was not included in the previous discussion. Section 2511(3) provides:

> Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. . . .

Prior to the *Keith* decision, which resolved the issue, section 2511(3) was susceptible to two subtly different interpretations. The first interpretation was articulated in *Keith* by Justice White, who concurred in the judgment but took a different position with respect to section 2511(3) than that adopted in the majority opinion. Under White's view, section 2511(3) carves out an exception to the general statutory requirement of a warrant, in those cases where the President considers surveillance necessary for one of the reasons specified in section 2511(3). The President's judgment in this matter can be ascertained through the statements of his deputy, the Attorney General. In *Keith*,

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[60] With respect to section 605 of the Federal Communications Act of 1934, it may be recalled, the Department of Justice had taken the position that disclosure of the contents of a wiretap within the Department or even within the executive branch did not constitute "divulgence" under section 605. See discussion *supra*. Section 2517(1) of title III makes it clear that disclosure within the Department does constitute "disclosure" as understood in section 2511(1).

[61] The closest that the wiretap program came to compliance with title III was the fact that each of the seventeen wiretaps was initially authorized by then Attorney General Mitchell (although he denies this); book VII, part 1, p. 157. Even in this respect there was no compliance with the statute, for section 2516(1) provides that the Attorney General shall authorize an *application for an order*—not the wiretap itself.

[62] For a discussion of whether the facts indicate that these were national security wiretaps, see, *infra*.

Attorney General Mitchell's affidavit describing the need for the wiretap was couched in different language from that of section 2511(3), and presented a less compelling justification. On that basis Justice White found that the case did not fall within the statutory exception provided in section 2511(3), and that the warrantless wiretap was therefore illegal. This approach and conclusion made it unnecessary to reach the constitutional question of whether the wiretap violated the fourth amendment. Under Justice White's view, therefore, an alleged "national security" wiretap must meet two separate tests: Section 2511(3) and the fourth amendment.[63]

The majority opinion in *Keith* took a different interpretation of section 2511(3). Writing for the Court, Justice Powell held that this section of Title III is "a congressional disclaimer and expression of neutrality":

> [N]othing in § 2511(3) was intended to *expand* or to *contract* or to *define* whatever presidential surveillance powers existed in matters affecting the national security.[64]
>
> Congress only intended to make clear that the Act simply did not legislate with respect to national security surveillances.[65]

Justice Powell based this conclusion on legislative history, notably a floor debate during which Senator Holland observed, "We are not affirmatively conferring any power upon the President."[66] Senator Hart stated that "nothing in section 2511(3) even attempts to define the limits of the President's national security power under present law * * * Section 2511(3) merely says that if the President has such a power, then its exercise is in no way affected by title III."[67]

The apparent implication of the *Keith* holding is that when the President, acting through the Attorney General, deems electronic surveillance to be necessary for one of the reasons set forth in section 2511(3), title III no longer controls and the surveillance must be judged solely by the standards of the fourth amendment. Justice Powell stated:

> If we could accept the Government's characterization of § 2511(3) as a congressionally prescribed exception to the general requirement of a warrant, it would be necessary to consider the question of whether the surveillance in this case came within the exception and, if so, whether the statutory exception was itself constitutionally valid. But . . . we hold that the statute is not the measure of the executive authority asserted in this case.[68]

On its face, this language appears to stand for the proposition that a mere assertion of a "national security" or "domestic security" interest is sufficient to remove a particular surveillance from the operation of title III; and that the assertion is not subject to judicial review. A

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[63] 407 U.S. at 337–43. To illustrate his point, Justice White posed a hypothetical example in which a warrantless surveillance, though constitutionally valid under the fourth amendment, would be illegal because it was not the type of Presidential action described in section 2511(3). *Id.* 338, n. 2.

Justice White further asserted that, even if the President deemed the wiretap necessary for one of the reasons set forth in section 2511(3) (i.e., curing the defect of Mitchell's affidavit), "there would remain the issue whether his discretion was properly authorized." *Id.* 344. In other words, the President's determination that a case was a matter of "national security" is subject to judicial review.

[64] *Id.* 308.

[65] Id. 306.

[66] 114 Congressional Record 14751; quoted in 407 U.S. at 307.

[67] Id. Justice Powell also observed that the nebulous language of section 2511(3) is inappropriate if it were intended to confer, restrict, or define a power. He pointed out that if section 2511(3) were meant to be an exception to the general prohibition of electronic surveillance in section 2511(1), Congress would have used the language found in section 2511(2) to describe the specific exceptions to section 2511(1). *Id.* 303–306.

[68] 407 U.S. at 308.

more limited reading of Justice Powell's opinion suggests that he quite properly did not even consider the hypothetical case of a President asserting a national or domestic security interest where in fact none existed.[69] Yet this is an issue which may arise under the factual circumstances of the present case: Some members might question whether there was even a colorable national or domestic security justification for certain of the warrantless wiretaps conducted under President Nixon's authority during 1969–71.[70]

In order to resolve this issue, the members may wish to refer directly to the statute itself, whose legislative intent they are well qualified to judge. It will be recalled that section 2511(1) prohibits all electronic surveillance except in the case of certain serious crimes specified in section 2516(1), and even in those cases a court order is required. Among the crimes enumerated in section 2516(1) are espionage, sabotage, treason, riots, and violations of the Atomic Energy Act of 1954. It is difficult to imagine a more serious threat to the national security than would be comprehended by these five crimes. If a warrant is required for a wiretap related to treason or espionage, section 2511(3) can scarcely be interpreted to mean that a warrant is not required in the case of other, unspecified crimes affecting the national or domestic security. Furthermore, as Justice Powell observed:

> In view of these and other interrelated provisions delineating permissible interceptions of particular criminal activity upon carefully specified conditions, it would have been incongruous for Congress to have legislated with respect to the important and complex area of national security in a single brief and nebulous paragraph [§ 2511(3)].[71]

In the final analysis, section 2511(3) may simply reflect congressional uncertainty as to the state of the law in 1968 with respect to warrantless national security wiretaps. The Department of Justice had carried on this type of wiretapping uninterruptedly from 1940–67. Regardless of whether those wiretaps violated section 605 of the Federal Communications Act of 1934,[72] prior to *Katz* there was no basis for requiring a warrant. Title III and *Katz* completely changed the law applicable to electronic surveillance, legalizing the practice under certain conditions but imposing the requirement of a warrant. In view of this dramatic change and the previous ambiguities in the law, Congress may have enacted section 2511(3) to preserve the President's constitutional powers in this area, if in fact any existed and survived the change in the law.[73]

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[69] The circumstances of the *Keith* case presented at least a colorable claim that section 2511(3) was applicable. The defendants were charged with conspiracy to destroy government property, and one of them was charged with the dynamite bombing of an office of the Central Intelligence Agency. From the outset, the majority opinion takes it for granted that these facts constitute a domestic security matter.

[70] A subsidiary factual question arises as to whether, with respect to each of the 1969–71 wiretaps, President Nixon or Attorney General Mitchell actually did make and assert a judgment that the wiretap was justified by a national or domestic security interest.

[71] 407 U.S. at 306.

[72] See discussion of section 605 at *supra*.

[73] In the Senate Report on title III, the discussion of section 2511(3) is very brief and confined to general propositions such as the following:

> Nothing in the proposed legislation seeks to disturb the power of the President to act in this area [national security wiretapping]. Limitations that may be deemed proper in the field of domestic affairs of a nation become artificial when international relations and internal security are at stake.

2 U.S. Code Cong. and Administrative News, 90th Cong., second sess., at 2156–57 (1968). Nowhere in the legislative history does there appear to be a discussion of what the President's powers are "in this area" or who shall ultimately decide whether a particular case falls within "this area".

The foregoing discussion of section 2511(3) indicates that it is an open question, with respect to the 1969–71 wiretaps, whether the mere assertion of a national or domestic security interest is sufficient to bar the application of title III. Some members of the committee may prefer to follow the implication of Justice Powell's opinion in *Keith* and decide that title III does not apply, in which case the legality of the wiretaps must be judged solely in the light of the fourth amendment.

Other members may feel that Justice Powell's opinion does not go so far as to preclude any inquiry into the assertion of a national or domestic security justification. Like Justice White in *Keith*, these members must make a threshold determination as to whether each of the 1969–71 wiretaps was in fact justified on one of the grounds specified in section 2511(3).[74] If it is determined that a particular wiretap was not thus justified, then the legality of that wiretap must be judged in the first instance according to the provisions of title III.[75] But even where a wiretap is found to have complied with the statutory requirements, it must ultimately be scrutinized in the light of fourth amendment standards as well.

### 4. CONSTITUTIONAL LAW: THE FOURTH AMENDMENT

The Supreme Court held in *Katz* that electronic surveillance is a search within the meaning of the fourth amendment, and that the interception of wire or oral communications is a seizure. The fourth amendment states in unequivocal language:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.[76]

This was the Founder's answer to the hated general warrants and writs of assistance used by the crown as a tool of oppression during the colonial period.[77] In the context of a discussion of warrantless national security wiretapping, it is significant that the fourth amendment speaks of the right of the people to be secure.[78]

This discussion of the fourth amendment's application to warrantless national security wiretapping will cover the applicability of the

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[74] See, *infra*.

[75] See, *infra*.

[76] U.S. Constitution amendment IV.

[77] General warrants, permitting indiscriminate search and seizure based on mere suspicion, were used extensively in seditious libel prosecutions of political dissenters in England during the prerevolutionary period. The practice was struck down as illegal in the landmark case of *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (1765), in which Lord Camden condemned the general warrant as "subversive of all the comforts of society." Id. 1066. Cf. *Wilkes* v. *Wood*, 19 How. St. Tr. 1153 (1763); *Huckle* v. *Money*, 2 Wils. K.B. 206 (1763); *Boyd* v. *United States*, 116 U.S. 616, 626, 630 (1886). Writs of assistance were a type of general warrant used by customs officers in colonial America for the detection of smuggled goods. In 1761 James Otis' electrifying speech denouncing writs of assistance moved John Adams to write later that "Then and there the child Independence was born."

Over the years many eminent constitutional scholars have compared wiretapping to general warrants and writs of assistance. In his famous dissent in *Olmstead* v. *United States*, Justice Brandeis declared:

> As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny when compared with wire-tapping.

277 U.S. at 476 (1928). Cf. Freund, commencement address at Williams College (June 9, 1974), where in Professor Freund referred to wiretapping as "the modern version of the hated writs of assistance."

[78] For the proposition that the national security includes the protection of individual rights and liberties, see e.g., *New York Times Co.* v. *United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring). Note, "Privacy and Political Freedom: Application of the Fourth Amendment to 'National Security' Investigations," 17 U.C.L.A. L. Rev. 1205, 1207 (1970).

amendment in a noncriminal context; the meaning of "reasonableness" in the amendment as expressed in the warrant clause; the recognized exceptions to the warrant requirement; and the arguments for and against an exception in the case of national security wiretapping.

*1. Searches Outside the Criminal Context*

The purpose of national security surveillance is frequently to gather intelligence information about subversive organizations in order to enhance the Government's preparedness for crises, rather than to obtain evidence for a criminal investigation or prosecution. Because this type of intelligence surveillance does not expose its target to criminal sanctions, the argument has been advanced that the warrant requirement of the fourth amendment is inapplicable.

This argument was sufficiently compelling in another context to persuade a 5–4 majority of the Supreme Court. In *Frank* v. *Maryland*, 359 U.S. 360 (1959), the Court denied the applicability of the warrant requirement to an inspection of a private home by a city health inspector for the purpose of abating a suspected public nuisance. The opinion noted that the inspection touched "* * * at most upon the periphery of the important interests safeguarded by the * * * [Fourth] Amendment's protection against official intrusion * * *" [79] the holding in *Frank* was overruled, however, in *Camera* v. *San Francisco Municipal Court*, 387 U.S. 523 (1967), another health inspection case. There it was held that the warrant requirement applied regardless of the fact that the searches were civil and not criminal in nature. The Court went on to say:

> We cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely "peripheral." It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.[80]

It is true that "it was on the issue of the right to be secured from searches for evidence to be used in criminal prosecutions or for forfeitures that the great battle for fundamental liberty was fought." [81] But despite the close interrelationship of the fourth and fifth amendments, the former has an independent vitality:

> The basic premise of the prohibition against searches was not protection against self-incrimination; it was the commonlaw right of a man to privacy in his home, a right which is one of the indispensable ultimate essentials of our concept of civilization * * * It was not related to crime or to suspicion of crime * * * To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection is a fantastic absurdity.[82]

"Searches" of the type described in these health inspection cases are the mildest imaginable form of governmental intrusion. In *Frank*, for example, the power of inspection was strictly limited. Valid grounds were required for suspecting the existence of a particular nuisance; the inspection had to occur during the day; and the inspector had no power to force entry if resisted. A national security surveillance, by contrast, involves the most far-reaching and insidious governmental intrusion into individual privacy. If the absence of criminality were no reason to dispense with the warrant requirement in the former

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[79] 359 U.S. at 367.
[80] 387 U.S. at 530.
[81] *Frank* v. *Maryland*, 359 U.S. 360, 365 (1959). See note 79, supra.
[82] *District of Columbia* v. *Little*, 178 F. 2d 13, 16–17 (D.D.C. 1949).

instance, a fortiori there must exist very compelling circumstances before allowing warrantless searches in the latter instance.

*2. "Reasonableness" under the fourth amendment*

A theory of reasonableness was expounded by Justice Minton in *United States* v. *Rabinowitz*, 339 U.S. 56 (1950), which involved a warrantless search incident to a valid arrest. The Court held that it was not necessary for the police officers to have obtained a search warrant, even though they had time to do so, because "the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." [83]

This innocuous-sounding proposition was refuted by Justice Frankfurter in a dissenting opinion:

> To say that the search must be reasonable is to require some criterion of reason. It is no guide at all either for a jury or for district judges or the police to say that an "unreasonable search" is forbidden—that the search must be reasonable. What is the test of reason which makes a search reasonable? The test is the reason underlying and expressed by the Fourth Amendment; the history and the experience which it embodies and the safeguards afforded by it against the evils to which it was a response.[84]

Justice Frankfurter's dissent eventually prevailed and Rabinowitz was overruled in *Chimel* v. *California*, 395 U.S. 752 (1968). Chimel also involved the scope of permissible search incident to a valid arrest. The majority opinion explicitly rejected the Rabinowitz theory that the reasonableness of the actual search could excuse the failure to obtain a search warrant:

> Even in the *Agnello* case the Court relied upon the rule that '[b]elief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.' [85]

In Rabinowitz Justice Minton had pointed out that judicial review was available to vindicate the rights of a victim of an unreasonable search. The deficiency of this reasoning was demonstrated in Chimel, in which the Court observed that "the [fourth] amendment is designed to prevent, not simply to redress, unlawful police action." [86] The suppression of illegally seized evidence may protect against criminal conviction, but it is a wholly inadequate safeguard of the rights guaranteed by the fourth amendment. For example, the exclusionary rule is irrelevant in cases where the unlawful search does not lead to criminal prosecution, either because of an exercise of prosecutorial discretion or because the victim of the search was found to be innocent. In the case of national security wiretapping, the purpose of the surveillance is often simply to gather intelligence information, not to obtain evidence for prosecution; hence the possibility of subsequent judicial review offers no protection at all.

The classic statement of the policy underlying the warrant requirement is that of Justice Jackson, writing for the Court in *Johnson* v. *United States*, 333 U.S. 10 (1948):

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[83] 339 U.S. at 66.
[84] 339 U.S. at 83.
[85] 395 U.S. at 762. The same point was made in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 480 (1971): If the police may make a warrantless search or arrest whenever they have probable cause, "then by the same logic any search or seizure could be carried out without a warrant, and we would simply have read the Fourth Amendment out of the Constitution."
[86] *Id.* 766 n. 12.

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a *neutral and detached magistrate* instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.[87]

The traditional interpretation of the fourth amendment was unambiguously laid down in Katz, in the context of electronic surveillance:

> Over and over again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes, *United States* v. *Jeffers*, 342 U.S. 48, 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.[88]

*3. Exceptions to the warrant requirements*

A few narrow exceptions have been recognized, over the years, to the rule that warrantless searches are per se unreasonable. The general principle is that a warrant will not be required in circumstances so urgent [89] that the purpose of the search would necessarily be frustrated if a warrant had to be obtained. In the ordinary law enforcement context these circumstances customarily arise where there is a danger of armed violence to an arresting officer, or a danger that the suspect will escape or remove the incriminating evidence. Most of the cases in which a warrantless search has been upheld come under the general rubric of "search incident to a valid arrest": a valid arrest is accompanied by the right to search the person of the one arrested and also to search things within his immediate physical control. A second category of cases in which the principle has been applied involves the warrantless search of an automobile stopped on the highway.

In both of these categories, the general rule has long been established and the courts have been primarily concerned with the scope of permissible search. For the fact that a warrant is not required does not mean that the scope of the search is vested in the discretion of the law enforcement officer. Even in these exceptional cases where a warrantless search is allowed, the underlying fourth amendment prohibition of unreasonableness still applies. Therefore "the scope of search must be strictly tied to and justified by the circumstances which rendered its initiation permissible." [90]

The rule that an automobile stopped on the highway may be searched without a warrant was enunciated in *Carroll* v. *United States*, 267 U.S. 132 (1925). The Court held that contraband goods concealed and illegally transported in an automobile may be searched for without a warrant, if the seizing officer has probable cause to believe that there is contraband in the automobile.[91] The rationale for this exception to the warrant requirement is that there is

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[87] 333 U.S. at 13–14. *Accord, e.g., Coolidge* v. *New Hampshire*, 403 U.S. 443, 453 (1971); *Aguilar* v. *Texas*, 378 U.S. 108, 110–11 (1964); *Wong Sun* v. *United States*, 371 U.S. 471, 481–82 (1963); *Jones* v. *United States*, 362 U.S. 257, 260 (1960).

[88] 389 U.S. at 357.

[89] The phrase "exigent circumstances" is frequently used: *e.g., Coolidge* v. *New Hampshire*, 403 U.S. 443, *passim* (1971); *Chambers* v. *Maroney*, 399 U.S. 42, 51 (1970); *McDonald* v. *United States*, 335 U.S. 451, 456 (1948).

[90] *Terry* v. *Ohio*, 392 U.S. 1, 19 (1968).

[91] 267 U.S. at 156. Carroll involved the illegal transportation of liquor under the National Prohibition Act, and most of the other cases in which the warrantless search of an automobile has been upheld have also involved bootlegging. E.g., *Brinegar* v. *United States*, 338 U.S. 160 (1949); *Husty* v. *United States*, 282 U.S. 694 (1931).

> A necessary difference between a search of a store, dwelling house or other structure . . . , and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.[92]

However, as the Court remarked in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), "[t]he word 'automobile' is not a talisman in whose presence the fourth amendment fades away and disappears." [93] In that case, many hours after they had arrested the defendant in his house, the police towed his car to the station house where they searched it without a warrant. The Court held the search illegal.

The first case to indicate the validity of a warrantless search incident to a valid arrest was *Agnello* v. *United States*, 269 U.S. 20 (1925). Under the facts of the case the search was held invalid because the house searched was located several blocks from the place of arrest, but the Court observed in dictum:

> The right without a search warrant contemporaneously to search persons lawfully arrested while commiting crime and to search the place where the arrest was made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.[94]

This statement offers two separate rationales for permitting the search: first, to seize the "instrumentalities of crime"; [95] and second, to prevent the suspect from escaping or assaulting the arresting officer with a weapon.

In *Marron* v. *United States*, 275 U.S. 192 (1927), federal agents had obtained a search warrant authorizing the seizure of liquor and items used in its manufacture. When they arrived at the premises to be searched, they arrested the person in charge and executed the warrant. In searching a closet for the items listed in the warrant they found an incriminating ledger, not covered by the warrant. The Court upheld the seizure of this ledger on the ground that it was an instrumentality of crime discovered in the course of a valid search incident to an arrest.

The holding in *Marron* was limited, however, by *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344 (1931). In the course of an arrest (which the Court assumed to be valid) agents searched the suspects' office, taking papers from a desk and a safe. Justice Butler, who had written the opinion in *Marron*, distinguished the earlier case on the basis that the ledger had been "visible and accessible and in the offender's immediate custody," and "there was no threat of force or general search or rummaging of the place." [96]

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[92] 267 U.S. at 153. *Accord, Chambers* v. *Maroney*, 399 U.S. 42, 51 (1970); the car is "movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained * * * The opportunity to search is fleeting * * *."

[93] 403 U.S. at 461–62.

[94] 269 U.S. at 30.

[95] The theory that an arresting officer can seize the instrumentalities of crime, but cannot seize "mere evidence", had its origin in the common law of search and seizure. Historically the right to seize property depended on the assertion by the government of a superior property interest. Thus stolen property (the fruits of crime) was always subject to seizure, and this rationale was gradually extended to cover the instrumentalities of crime as well on the ground that they were contraband. This archaic and artificial distinction was finally discarded in *Warden* v. *Hayden*, 387 U.S. 294 (1967).

[96] 282 U.S. at 358. Cf. *United States* v. *Lefkowitz*, 285 U.S. 452 (1932), also involving a search of the desk, cabinets, etc., in the room in which the arrest occurred. The Court ruled that this was a general exploratory search, hence invalid; and that the papers seized were mere evidence.

*Harris* v. *United States*, 331 U.S. 145 (1947), marked a radical departure. Officers arrested the defendant on a forgery charge in the living room of his four-room apartment, and then made a thorough search of the entire apartment looking for two canceled checks. Instead they found in his desk in the bedroom a sealed envelope containing altered Selective Service documents, which were used to secure his conviction on a different charge. Over a strong dissent the Court held the search valid, because the defendant was in exclusive possession of the apartment and thus his "control" extended to the bedroom.

In the following year the Court made a brief return to tradition in *Trupiano* v. *United States*, 334 U.S. 699 (1948). Federal agents raided the site of an illicit distillery, arresting a man standing near the still and seizing the still. The Court held that the search was unlawful because the agents had had plenty of time before the raid to procure a search warrant. The fact that the still was within the immediate control of a person lawfully arrested was dismissed as a "fortuitous circumstance."

*Trupiano* was overruled only 2 years later by *United States* v. Rabinowitz, 339 U.S. 56 (1950).[97] Federal agents lawfully arrested the defendant in his one-room office, and then proceeded without a warrant to search his desk, safe, and file cabinets for an hour and a half, seizing several hundred forged stamps. As in *Trupiano*, the agents had had ample time to obtain a search warrant; but the Court upheld the search on the ground that it was reasonable, despite the lack of a warrant. *Harris* and *Rabinowitz* thus gave rise to an anomalous result: by simply arranging to arrest a suspect at home or in his office rather than elsewhere, the police could engage in a search not justified by probable cause. This result had been condemned by Judge Learned Hand in *United States* v. *Kirschenblatt*, 16 F. 2d 202 (1926):

> After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate.[98]

*Harris* and *Rabinowitz* were overruled by *Chimel* v. *California*, 395 U.S. 752 (1969), which conclusively settled the question of the scope of permissible search incident to a valid arrest. Police officers had conducted a search of the defendant's entire house, without a warrant and over his objections, and had seized stolen property which was used to convict the defendant on a burglary charge. The Court held that the search could logically extend no farther than to the person arrested and objects in his immediate vicinity; that is, no farther than absolutely necessary to prevent the suspect from drawing a weapon or reaching to destroy evidence.[99] To be sure, the opinion observed, it might seen reasonable under certain circumstances to engage in a wider search; but the reason for the exemption from the warrant requirement would not logically support such a search. Furthermore, if

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[97] See previous discussion of *Rabinowitz, supra.*

[98] 16 F. 2d at 203.

[99] In two recent stop-and-frisk cases the Supreme Court held that a search of the suspect's person was justified when it was a "protective * * * search for weapons," *Terry* v. *Ohio*, 392 U.S. 1, 19 (1967); but unlawful when the search was made in order to find narcotics rather than for protection, *Sibron* v. *New York*, 392 U.S. 40 (1967).

the rule of logic were abandoned in favor of a test of reasonableness, each case would be decided on the basis of

> * * * a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point. It is not easy to explain why, for instance, it is less subjectively "reasonable" to search a man's house when he is arrested on his front lawn—or just down the street—than it is when he happens to be in the house at the time of arrest.[100]

It is unlikely that these traditional exceptions could ever apply to electronic surveillance. "Even electronic surveillance substantially contemporeaneous with an individual's arrest could hardly be deemed an 'incident' of that arrest." [101] A hypothetical case can be imagined where it would be necessary to place a wiretap immediately so as to eavesdrop on a particular conversation whose message might never be repeated. In practice, however, national security surveillance typically involves long-term monitoring of a suspect's conversations, with none of the urgency associated with the traditional exceptions to the warrant requirement. It is therefore necessary to look elsewhere to find a justification for an exception to the warrant requirement.

*4. Possible Exception to Warrant Requirement in Cases Involving National or Domestic Security*

The preceding discussion of fourth amendment principles has established that the amendment applies to electronic surveillance regardless of whether conducted for purposes of criminal prosecution or intelligence gathering; that warrantless searches (including wiretapping) are per se unreasonable under the amendment, unless brought within one of the recognized classes of exceptions to the warrant requirement; and that the exceptions recognized in ordinary search and seizure cases are by their nature very unlikely to apply in cases of wiretapping.

An analysis of the constitutionality of the 1969–71 wiretaps, therefore, must start with the proposition that these warrantless wiretaps were in violation of the fourth amendment, unless it can be shown that an exception to the warrant requirement is justified on some other constitutional basis. Of course, in the context of the impeachment inquiry the relevant question may be, not whether the wiretaps were in fact constitutionally valid, but whether President Nixon believed them to be valid and thus acted under an assertion of constitutional right. It is for the members of the committee to decide whether or not the President's belief was reasonable.

In order to assist the members in making that determination, this section begins with a review of the applicable case law as of the period in question, 1969–71. There follows a discussion of constitutional and policy considerations which were available to guide the President's decisionmaking in the absence of definitive case law.

*a. Applicable case law.*—The issue of whether or not an exception to the warrant requirement should be recognized in national or domestic security cases did not arise until 1967 when Katz was decided, bringing all electronic surveillance under the umbrella of fourth amendment protection irrespective of trespass or invasion of constitu-

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[100] 395 U.S. at 764–65.
[101] *Katz* v. *United States*, 389 U.S. 347, 358–59 (1967).

tionally protected areas.[102] The Court alluded to the national security issue but reserved judgment, noting that the issue was not presented by the case.[103] Title III of the Omnibus Crime Control and Safe Streets Act was enacted in 1968. Section 2511(3) apparently indicates that Congress did not intend to legislate with respect to the warrant requirement for surveillances involving national or domestic security.[104] As of 1968, therefore, the issue remained open.[105]

In March of 1969 the Supreme Court held in *Alderman* v. *United States*, 394 U.S. 165, that whenever a defendant's conversations are illegally overheard, a suppression hearing must be held in order to determine whether the fruits of that illegal search contributed to the Government's case.[106] Following *Alderman*, the lower courts were called upon to decide a number of cases involving a defendant's demand for disclosure of wiretap evidence which the Government claimed to have obtained in the process of gathering national security intelligence. In such a case, the district court must first determine whether the wiretap was illegal, in which case the exclusionary rule applies.[107]

One of the first cases to arise after *Alderman* was *United States* v. *Stone*, 305 F. Supp. 75 (D.D.C. September 1969). The defendants were indicted for conspiring to defraud the Government in the negotiation and administration of defense contracts. One defendant had been wiretapped from 1956 to 1961, "solely to gather foregin intelligence in-

[102] Cf. *United States* v. *Coplon*, 185 F. 2d 629, 640 (2d Cir. 1950), where Chief Judge Learned Hand suggested that it might be desirable to "set limits * * * to the immunity from 'wiretapping' of those who are shown by independent evidence to be probably engaged" in certain serious crimes, including espionage and other activities affecting the "national security and defense." This is a suggestion for a legislative amendment of § 605 of the Communications Act, which banned all wiretapping. By no means does the language suggest an exception to the fourth amendment warrant requirement (which in any event was not considered in 1950 to apply to wiretapping). On the contrary, the phrase "who are shown by independent evidence to be probably engaged" calls to mind the showing of probable cause for a warrant to issue.

[103] 389 U.S. at 358, n. 23. In his concurring opinion, however, Justice White took up the question and flatly asserted:

"We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable." Id. 364.

This logic is defective for the reasons discussed in connection with the *Rabinowitz* case; supra. Justice Douglas, joined by Justice Brennan, wrote a concurring opinion in Katz solely to rebut Justice White's assertion. They noted that "the Executive Branch is not supposed to be neutral and disinterested" where the national security is threatened; rather it has the constitutional duty vigorously to investigate and prevent breaches of national security. Therefore neither the President nor the Attorney General can perform the magistrate's role. Id. 359–60.

Neither opinion adequately defines the meaning of "national security" as used therein.

[104] See discussion of § 2511(3), *supra*.

[105] Justice Stewart attested to this in *Giordano* v. *United States*, 394 U.S. 310 (1969) (concurring opinion).

[106] A defendant who is prosecuted for a crime on the basis of evidence obtained by illegal wiretaps has no way of challenging the tainted indictment or conviction unless he is permitted to make discovery of the tapes or logs of the wiretaps. In Alderman, the Government conceded that it must disclose the relevant portions of illegal wiretap evidence; but it argued that the determination of relevancy should be made by the trial judge after an *in camera* inspection of the evidence. The Supreme Court held that the question of relvancy was too subtle for the judge to decide, and that only the defendant and his counsel were sufficiently familiar with the facts to decide what was relevant. This holding was modified two weeks later, however, in *Taglianetti* v. *United States*, 394 U.S. 316 (1969), which explained that in some cases the relevancy question would not be too subtle for the judge to resolve through an inspection of the evidence in camera.

The alternative to disclosure would be dismissal of the case. As Justice White said, writing for the majority:

"It may be that the prospect of disclosure will compel the Government to dismiss some prosecutions in deference to national security or third-party interests. But this is a choice the Government concededly faces with respect to material which it has obtained illegally * * *" 394 U.S. at 184.

Justice White admits here the possibility that a warrantless "national security" wiretap might be illegal. This contradicts his earlier position expressed in Katz; see note 103, supra.

[107] In *Weeks* v. *United States*, 232 U.S. 383 (1917) it was held that in a Federal prosecution the fourth amendment barred the use of evidence secured through an illegal search and seizure. *Mapp* v. *Ohio*, 367 U.S. 643 (1961), held that this rule applied to State prosecutions as well.

formation" according to the Government. The court held that since the wiretapping antedated Katz it was not a violation of the fourth amendment. There remained the question whether the wiretapping violated § 605 of the Federal Communications Act of 1934; the court thought not, basing its holding on the absence of legislative intent to ban "foreign intelligence" wiretaps and the "similar unawareness of the problem" in the *Nardone* decisions.[108] Thus Stone left open both the constitutional and the statutory issue.

*United States* v. *Clay*, 430 F. 2d 165 (5th Cir. July 1970),[109] arose from Muhammad Ali's refusal to be inducted into the Army. After his conviction was affirmed he discovered that the Government had tapped five of his telephone conversations in 1964–65. The Supreme Court granted *certiorari* and remanded to the district court, which ordered the Government to turn over logs of four of the intercepted conversations. The fifth log was inspected *in camera* and held to be lawful surveillance for the purpose of gathering foreign intelligence information.[110] On appeal, the circuit court affirmed. As in *Stone*, since the wiretapping antedated title III it was governed by section 605. The court held that section 605 did not apply, because of the "clear statement of Congress" in title III, section 2511(3), to the effect that section 605 was intended to "limit the President's constitutional prerogative to obtain foreign intelligence information."[111] Similarly, as in *Stone* the fourth amendment did not apply because the wiretapping antedated *Katz*. Nevertheless, in a vague way the court addressed the constitutional issue, declaring that "[d]etermination of this case requires that we balance the rights of the defendant and the national interest."[112] After observing that the Attorney General had submitted his affidavit that the fifth wiretap was conducted for the purpose of gathering foreign intelligence information—an assertion which both courts had verified by *in camera* inspections of the fifth log—the opinion stated:

> Further judicial inquiry would be improper and should not occur. It would be "intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly kept secret." . . . We, therefore, discern no constitutional prohibition against the fifth wiretap.[113]

The first case in which the fourth amendment issue arose was *United States* v. *Brown*, 317 F. Supp. 531 (E.D. La. July 1970).[114] H. Rap Brown was convicted in May 1968 for interstate transportation of a firearm while under indictment. While he was in jail awaiting trial in February 1968 (after the decision in *Katz* but before the enactment of title III), four of Brown's telephone conversations were monitored and recorded. On appeal, the circuit court reversed the conviction and remanded to the district court for a suppression hearing in accordance with *Alderman*. After holding the hearing, the district court decided

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[108] 305 F. Supp. at 82. It may be noteworthy that the court did not avail itself of the other arguments advanced by the government, relating to the President's powers as Commander in Chief and "the Nation's sole organ in the field of foreign affairs."

[109] *Reversed on other grounds*, 403 U.S. 698 (1971).

[110] After an extensive suppression hearing in June 1969, District Judge Ingraham made the following comment in connection with the fifth log:

"[I]t is the executive and not the judiciary, which alone possesses both the expertise and the factual background to assess the reasonableness of such a surveillance."
S.D. Tex., Houston Div., Cr. No. 67–11–94 (memorandum opinion of July 14, 1969).

[111] 430 F. 2d at 171.

[112] Id.

[113] Id., quoting from *C. & S. Air Lines* v. *Waterman Corp.*, 333 U.S. 103, 111 (1948).

[114] *Affirmed*, 484 F. 2d 418 (5th Cir. 1973).

that three of the logs did not have to be disclosed because the surveillances were lawful, and the fourth log, which was disclosed, contained no evidence relevant to Brown's conviction. In holding the first three surveillances lawful, the court simply adopted the Government's position that—

> the surveillances here in question should be declared lawful on the ground that they were authorized by the President or the Attorney General for the purpose of national security.[115]

Without even mentioning the fourth amendment, the court concluded that "the judiciary should not question the decision of the executive department." [116] As for the applicability of section 605, the court agreed with *Stone* that the *Nardone* decision reflected an unawareness of the problem of the need to gather intelligence information.

*United States* v. *Butenko*, 318 F. Supp. 66 (D.N.J. October 1970) concerned the conviction of two defendants for conspiracy to transmit national defense information to the Soviet Union. After conviction, the defendants discovered that the Government had conducted wiretaps intercepting their conversations during the period 1962–64. The Government did not rely on pre-*Katz* law, however, but took the position that these wiretaps were lawful under the fourth amendment. The court agreed, noting that "the legitimate needs of law enforcement" will sometimes justify an exception to the warrant requirement and that successive Presidents had authorized "national security" wiretapping since 1940.[117] Passages from *Marbury* v. *Madison* and *C. & S. Air Lines* v. *Waterman Corp.*, were quoted in support of the President's inherent political powers, not subject to judicial review.[118] The opinion concluded:

> The same factors that precluded judicial review in Chicago & Southern Air Lines, would certainly be applicable to a situation such as we have here, where the Attorney General, acting as the President's alter ego, authorizes the use of electronic surveillances for the purpose of gathering foreign intelligence information.[119]

Finally, it was observed that it would be unrealistic to impose on the courts, which lack the necessary expertise and factual background, the burden of handling warrant applications in cases of national security wiretaps. As in *Stone* and *Brown*, the argument that the wiretaps violated § 605 was dismissed on the ground that *Nardone* and its progeny simply did not address the issue of the President's power to gather foreign intelligence information.

It will be observed that these four cases (*Stone*, *Clay*, *Brown* and *Butenko*) all held warantless wiretaps to be lawful where conducted to "gather foreign intelligence information." Only *Brown* and *Butenko* involved the fourth amendment, and this issue received perfunctory treatment in *Brown*. Analysis of the factual basis for decision in these

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[115] 317 F. Supp. at 535.

[116] Id. 536.

[117] 318 F. Supp. at 71.

[118] Id. 71–72. The passage quoted from *Marbury* v. *Madison*, 5 U.S. 137, 165 (1803), was as follows:

"By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience."

The passage from *C. & S. Air Lines* v. *Waterman Corp.* was a more extensive excerpt from the same part of the opinion quoted in *Clay*, *supra* note 110.

[119] 318 F. Supp. at 72. *C. & S. Air Lines* involved the President's award of international airline routes. No question of individual rights was presented, unlike these wiretap cases in which fourth amendment rights are central.

cases is unfortunately almost impossible, because the courts were obliged to preserve the secrecy of those wiretaps which they held valid. Of course, the contents of those wiretaps were known to the Department of Justice and the President.

In January 1971 two cases were decided which held that where wiretapping was conducted for domestic security reasons, the failure to obtain a warrant was a violation of the fourth amendment. The first case was *United States* v. *Smith*, 321 F. Supp. 424 (C.D. Cal. January 1971), in which the defendant had appealed from a conviction for unlawful possession of firearms by a person previously convicted of a felony. While the appeal was pending, the Government disclosed that Smith had participated in conversations which had been wiretapped "to gather intelligence information relating to the national security." The Government argued that the President, acting through the Attorney General, has the inherent constitutional power to authorize warrantless electronic surveillance in national security cases and to be the sole judge of whether a given case is a matter of national security. This asserted power was not limited to foreign intelligence cases.[120]

The court began by observing that section 2511(3) expresses an exception to certain statutory requirements but that the fourth amendment still controls. The Government's argument that the warrant procedure is only one way of assuring that a search is reasonable was rejected by the court, citing *Chimel* v. *California*, 395 U.S. 752 (1969). The long history of warrantless wiretaps in national security cases was dismissed as irrelevant. The court responded, however, to the argument that national and domestic security cases involved factual considerations too subtle and complex to be readily explained to a magistrate in a warrant proceeding:

> This seems to be an attempt to invoke the 'practicality' exception to the warrant procedure. In cases involving foreign affairs this argument might very well prevail. In that situation, numerous non-judicial factors are relevant and the decision would probably be far removed from the consideration of probable cause. However, this argument is totally inapplicable in a criminal proceeding in a federal court involving a domestic situation.[121]

For these reason the court held that "in wholly domestic situations there is no national security exception from the warrant requirement of the fourth amendment."[122]

The case which came to be popularly known as the *Keith* case began as *United States* v. *Sinclair*, 321 F. Supp. 1974 (E.D. Mich. January 1971). Several defendants were indicted for conspiring to bomb a CIA office. In response to a defense motion for disclosure of records of wiretaps, the Government filed an affidavit of Attorney General Mitchell which stated that the wiretaps were used "to gather intelli-

[120] The court observed that "there is nothing in the present case which suggests that it is anything other than a purely domestic situation." 321 F. Supp. at 426. This fact was admitted by the Government, which justified the wiretaps as a method of gathering "intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attach and subvert the existing structure of the government." Id. The Government's use of the term "national security," therefore, was intended to extend its meaning to include domestic security matters as well as those involving foreign intelligence.

[121] Id. 428. The court elaborated on the distinction between foreign and domestic security matters as follows:

"Unlike in the area of foreign affairs, in the area of domestic political activity the Government can act only in limited ways * * * However, the Government seems to approach these dissident domestic organizations in the same fashion as it deals with unfriendly foreign powers. The government cannot act in this manner when only domestic political organizations are involved, even if those organizations espouse views which are inconsistent with our present form of Government." Id. 428–29.

[122] Id. 429.

gence information deemed necessary to protect the Nation from attempts of domestic organizations to attack and subvert the existing structure of the Government." [123] After an *in camera* inspection of the logs, the district court granted the disclosure motion on the ground that the warrantless wiretaps infringed on the defendants' fourth amendment rights. The opinion relies heavily on *United States* v. *Smith*. Judge Keith summarized the court's position in unequivocal language:

> . . . the position of the Attorney General is untenable. It is supported neither historically, nor by the language of the Omnibus Crime Act. Such power held by one individual was never contemplated by the framers of our Constitution and cannot be tolerated today.[124]

The Government filed a petition for mandamus to require the district court to vacate its order. This petition was denied, *United States* v. *United States District Court*, 444 F. 2d 651 (6th Cir. April 1971), and the Supreme Court granted certiorari. The Court held (June 1972) that the fourth amendment requires prior judicial approval for domestic security surveillance. The majority opinion began by disposing of section 2511(3) as a mere congressional disclaimer, not an exception to the statutory warrant requirement.[125] In regard to the fourth amendment, its freedoms cannot be guaranteed if domestic security surveillances are conducted solely within the discretion of the executive branch.

> The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.[126]

In holding that there is no exception to the warrant requirement in domestic security cases, the Court was careful to "express no opinion as to the issues which may be involved with respect to activities of foreign powers or their agents." [127] In regard to the distinction between "domestic" and "foreign," the opinion defined the term "domestic organization" to mean "a group or organization (whether formally or informally constituted) composed of citizens of the United States and which has no significant connection with a foreign power, its agents or agencies." [128]

In addition to reserving judgment on the issue of whether a warrant is required for foreign intelligence surveillance, the Supreme Court decision in *Keith* does not necessarily define the state of the law in the period from May 1969 to February 1971, when the wiretaps in question were being conducted.[129] Pending a Supreme Court decision on a particular issue, it has been the policy of the Department of Justice to rely on the case law as it is developed in the lower courts "Statement of Information Submitted on Behalf of President Nixon," book IV, 194. Indeed, counsel for President Nixon have urged that "there was

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[123] *United States* v. *United States District Court*, 407 U.S. 297, 300 n. 2 (1972).

[124] *United States* v. *Sinclair*, 321 F. Supp. 1074, 1079 (E.D. Mich. 1971).

[125] *United States* v. *United States District Court*, 407 U.S. 297, 301–308 (1972). Justice White concurred in the result but never reached the constitutional question because he felt that section 2511(3) does create a national security exception which did not, however, apply in the instant case.

[126] Id. 317.

[127] Id. 321–22.

[128] Id. 309, n. 3. Attorney General Saxbe recently paraphrased this language in saying that "there is no domestic activity subject to warrantless wiretapping unless it is * * * financed by, organized by, and directed by a foreign power outside our borders." Senate subcommittee hearings at 474 (May 23, 1974).

[129] If the *Keith* decision had been rendered before that surveillance was carried out, it would be hard to deny the illegality of the wiretaps since it is unlikely that all (if, indeed, any) of the 17 persons who were tapped had a "significant connection with a foreign power, its agents or agencies."

clear legal authority on the legality of warantless national security wiretaps at the time the 17 wiretaps were conducted (Id., 197.") Two cases are cited in support of this proposition: *United States* v. *Clay*, 430 F. 2d 165 (5th Cir. 1970), and *United States* v. *Brown*, 317 F. Supp. 531 (E.D. La. 1970).

It is true that *Clay* and *Brown* held, under the law which was then applicable and in the particular factual situations which those cases presented, that a warrant need not be obtained for a wiretap whose purpose is to "gather foreign intelligence information." However, it is a serious overstatement to say that these decisions represented "clear legal authority on the legality of warrantless national security wiretaps." First, in neither case was title III directly applicable; both were decided under the statutory rule of § 605, because the wiretaps took place before the effective date of title III. § 605 banned *all* wiretapping and therefore does not address the warrant issue at all. Second, the fourth amendment was not even applicable in *Clay*, since the wiretaps in question took place prior to *Katz*. The wiretaps in *Brown* occurred after *Katz*, but the court's opinion in that case did not even mention the fourth amendment, except to say that

> The Supreme Court has never decided whether the Attorney General's authorization of a wiretaps for the purpose of gathering foreign intelligence information violates the Fourth Amendment.
> The question was specifically reserved in *Katz* v. *United States*.[130]

The court concluded that in the absence of a Supreme Court ruling it was for the Attorney General to decide and "the judiciary should not question the decision of the executive department." [131] This complete abdication of the Court's role is scarcely to be characterized as the definitive holding on the question of warrantless wiretaps. Third, since the Court in both *Clay* and *Brown* was obliged to preserve the secrecy of the wiretaps in question, the opinions contain no discussion of the factual circumstances on which was based the judgment that the purpose of the wiretaps was to "gather foreign intelligence information."

Of all the wiretap cases decided during the period in question (May 1969–February 1971), the opinion in *Smith* is the only one which explores the fourth amendment question in depth. That opinion was expressly adopted by the district court in *Sinclair* and significantly influenced Justice Powell's opinion when the *Keith* case reached the Supreme Court. In these respects, *Smith* represents much clearer legal authority than does *Clay* or *Brown*. However, the factual context from which *Smith* arose was entirely different from the context which gave rise to the 1969–71 wiretaps. Furthermore, *Smith* was decided only 1 month before the last of the 1969–71 wiretaps were discontinued.

For these reasons, it may be fairly said that during the period of the 1969–71 wiretaps, the courts had not resolved the question whether an exception to the fourth amendment warrant requirement should be recognized in wiretap cases where a national or domestic security interest was asserted. *Keith* subsequently answered that question in the negative with respect to domestic security wiretaps but expressed no opinion about foreign or "national" security wiretaps. This raises the question whether, if a constitutional question is unsettled, the

[130] 317 F. Supp. at 535.
[131] Id. 536.

President may properly engage in conduct which is likely to be held unconstitutional.[132]

From the foregoing discussion it appears that in May 1969, when the wiretapping program was initiated, the following considerations were available to guide President Nixon's judgment:

(1) Warrantless wiretapping had been carried on for nearly 30 years by the Department of Justice; but this practice was of limited "precedential" value because on its face it violated the governing statutory law (§ 605), which in any event had been superseded by title III in 1968.

(2) As of 1969 it was uncertain whether or to what extent title III applied to national or domestic security wiretapping.

(3) *Katz* had held that wiretapping is subject to the fourth amendment but had reserved the question whether safeguards other than a warrant might be acceptable in "national security" cases.

(4) Prior to May 1969 neither the Supreme Court nor the lower courts had even addressed the question reserved in *Katz*. (Between May 1969 and February 1971, several lower courts would render decisions in this area, but the question would not be resolved until the Supreme Court *Keith* decision in 1972.)

In the absence of any other controlling authority to guide his decision, therefore, it was President Nixon's duty under his oath of office to make his own determination whether the proposed wiretapping program would be in violation of the fourth amendment. The section which follows is a discussion of the constitutional and policy considerations which were available to the President in making that determination.

*b. Analysis of the possible national or domestic security exception to the warrant requirement.*—It is important at the outset to observe what issues are not under consideration in this analysis. First, it is settled that wiretapping per se is not prohibited by the fourth amendment. Second, it is beyond argument that cases may arise in which wiretapping is necessary, perhaps even imperative, in order to protect the safety of the Nation.[133] (Whether or not the 1969–71 wiretaps responded to an emergency of this sort is, of course, a factual and judgmental question properly reserved to the members of the committee.) Third, as a general proposition the President has broad powers—sometimes described as "inherent powers"—which derive from his constitutional role as Commander in Chief and "sole organ" of the Nation in the conduct of foreign affairs.

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[132] An analogous question arose in the impeachment of President Johnson, who violated a statute which he believed to be unconstitutional. This issue will be discussed in section IV, *infra*.

[133] It might be noted parenthetically that the warrant requirement of the fourth amendment does not distinguish between different substantive offenses according to their seriousness. As Justice Douglas pointed out in his concurring opinion in *Katz*.

"Since spies and saboteurs are as entitled to the protection of the fourth amendment as suspected gamblers like petitioner, I cannot agree that where spies and saboteurs are involved adequate protection of fourth amendment rights is assured when the President and Attorney General assume both the position of adversary-and-prosecutor and disinterested, neutral magistrate * * * I would * * * not improvise because a particular crime seems particularly heinous." 389 U.S. at 360 (1967).

The fact that the warrant requirement applies without reference to the nature of the reason for the search does not mean, however, that the standard of probable cause cannot be varied in order to accommodate the circumstances. For example, in *Camera v. San Francisco Municipal Court*, 387 U.S. 523, 538 (1967), the Supreme Court recognized that the probable cause requirement would be less rigorous in the case of a health inspection than in the case of a criminal investigation. *See* NOTE, The "National Security" Wiretap: Presidential Prerogative or Judicial Responsibility, 45 S. Cal. L. Rev. 888, 895–97 (1972).

The issue under consideration has nothing to do with presidential powers.[134] At issue is the much narrower question whether any characteristic of national or domestic security wiretapping in general, or of the 1969–71 wiretaps in particular, can justify an exception to the warrant requirement of the fourth amendment. It will be recalled that the general principle for permitting exceptions to the warrant requirement is that a warrant will not be required in circumstances where the very act of obtaining the warrant would necessarily frustrate the purpose of the search.[135] In the ordinary search and seizure context, the exception usually arises in cases where the need for an immediate search is so urgent that the delay involved in obtaining a warrant would be fatal. The need for electronic surveillance is seldom so immediate that a few hours' delay would make any difference (although title III does contain a provision for that contingency).[136] Some other "exigent circumstances," therefore, must be found to justify a warrantless wiretap.

The principal argument in favor of an exception to the warrant requirement in cases of national or domestic security wiretapping, and one which might understandably have been in President Nixon's mind in May of 1969, is the supposed danger of leaks. As Attorney General Brownell explained 20 years ago:

> There is indeed strong danger of leaks if application is made to a court, because in addition to the judge, you have the clerk, the stenographer and some other officer like a law assistant or bailiff who may be apprised of the nature of the application.[137]

If, through indiscretion or corruptibility, one of these persons divulged sensitive information which had been revealed in the warrant proceeding, then the suspect might be put on notice and the purpose of the wiretap frustrated.[138]

Discussion of this justification for dispensing with the warrant requirement must begin with the observation that it does not present the same degree of necessity or "exigency" which is required for the more traditional exceptions to the warrant requirement. In the case of an arrest or an automobile stopped on the highway, the suspect is automatically put on notice that he is the object of police scrutiny and that the time has arrived for him to take action (draw a weapon or destroy the evidence). By contrast, in the wiretap case the suspect will never be put on notice unless there is a leak from the court, which in any event might not occur until days later. In short, the possibility that the purpose of the "search" would be frustrated by the warrant application is both contingent and remote.

In fact, if past experience is any indication the likelihood of a leak is exceedingly small. The courts are frequently called upon to receive classified information in camera, including information relating to national security wiretaps. Yet the Government has not been able to

[134] The President cannot be heard to argue that his office puts him above the Constitution and conveys the power to make unreasonable searches and seizures. Even in those cases which have upheld the most extreme exercise of Presidential power, it has never been suggested that the President could disregard the Constitution. E.g., *Hirabayashi* v. *United States*, 320 U.S. 81 (1943); *Korematsu* v. *United States*, 323 U.S. 214 (1944). As the court declared in *United States* v. *Butenko*, 318 F. Supp. 66, 71 (D. N.J. 1970):

"Of course, it is recognized that in the exercise of his powers, the President must act in accordance with the applicable provisions of the Constitution."

[135] See discussion of exceptions to the warrant requirement, supra.

[136] See discussion of § 2518(7), supra.

[137] Brownell, *Public Security and Wire Tapping*, *supra* note 37, at 210.

[138] Though not relevant to the present discussion, an additional danger is the possibility that confidential material would be disclosed to the public.

provide a single example in which a leak of confidential information took place because of a breach of duty on the part of the judiciary. Indeed, precisely this question arose during hearings before the House Committee on the Judiciary in 1953. Members were questioning Miles F. McDonald, district attorney of Kings County (Brooklyn), N.Y., on the experience of New York State, where wiretapping was permitted pursuant to a court order. Mr. McDonald testified as follows: [139]

> Mr. KEATING. But so far as leakages in the court are concerned, have you ever had any bad experience?
> Mr. MCDONALD. Never.

The possible threat of leaks is also contemplated in title III. Congress conceived of situations so delicate that, for example, the Attorney General might direct the wiretap warrant application to the Chief Judge of the Court of Appeals for the District of Columbia Circuit.[140] In the light of this statutory provision, the likelihood of a leak through the court appears to be virtually nonexistent.

A second argument often urged in favor of an exception to the warrant requirement is derived from the fact that national and domestic security surveillance differs from ordinary criminal investigation. For example, it is argued that the factors to be weighed in determining probable cause for a national or domestic security wiretap are too complex and subtle for judicial evaluation; or that they involve arcane foreign policy considerations of which the courts are ignorant. The short answer to this argument is that the courts regularly handle the most complicated factual and legal questions which arise in our society, and that if a threat to national or domestic security is so obscure that its significance cannot be conveyed to the court, it may be doubted whether there is probably cause for conducting the wiretap.[141]

A related argument is that the traditional prerequisites of a showing of probable cause [142] are difficult or impossible to satisfy in a national security investigation. National security surveillances are apt to be directed at ongoing intelligence gathering rather than the obtaining of evidence for a particular criminal prosecution.[143] In the course of collecting intelligence and monitoring the activities of subversive groups the Government may be unable to "particularly describe" the offense which has been or is being committed, the place to be searched and the things to be seized. Again, the short answer is that

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[139] Hearings before Subcommittee No. 3, House Committee on the Judiciary on H.R. 408, H.R. 477, H.R. 3552, H.R. 5149, 83d Cong., 1st sess. 82 (1953).

[140] 18 U.S.C. § 2510(9). Furthermore, it could undoubtedly have been arranged, in the case of the 1969–71 wiretaps, for the Department of Justice to have supplied the necessary clerical assistance at the warrant proceeding in order to minimize the possibility of leaks.

In this connection it may be noted that if Congress had doubted the ability of the courts to handle confidential information, it would not have included treason, espionage and sabotage among the offenses enumerated in § 2516(1).

[141] The proposition that the courts lack the necessary expertise is most often advanced in connection with national (as opposed to domestic) security wiretapping, because of the special circumstances which arise in the sphere of foreign relations. Again, if Congress had doubted the judicial competence to deal with national security matters, it would not have required a court order for wiretaps relating to treason, espionage, sabotage, etc.

[142] "Probable cause under the fourth amendment exists where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed." *Berger* v. *New York*, 388 U.S. 41, 55 (1967).

[143] This rationale is frequently cited as a justification for the relaxation or elimination of the warrant requirement. It is cognate to the misplaced argument that the fourth amendment has not application outside the criminal context; see *supra*.

if the objectives of such a surveillance are so vague and difficult to describe, the surveillance should be forbidden.[144] More realistically, if the President acting through his Attorney General made a wiretap warrant application to a district or circuit court judge, based on an affidavit that the wiretap was necessary for purposes of national security, it would be an exceedingly rare case in which the court order was not granted.[145]

Neither the possibility of leaks nor the difficulty of showing probable cause, therefore, appears to be a plausible justification for granting an exception to the warrant requirement in wiretap cases involving national or domestic security. Indeed, there are two special characteristics of this type of wiretapping which suggest that the importance of the warrant requirement is especially compelling.

First, the purpose of an ordinary criminal investigation is to obtain evidence which can be used to indict and convict the offender. If evidence is illegally seized through the use of a warrantless wiretap, the defendant can call upon the court to rule it inadmissible. By contrast, the purpose of a national or domestic security wiretap is often simply to "gather intelligence information" without any intention of prosecuting violations of criminal law. Under these circumstances there is no natural stopping point for the surveillance. In the criminal investigation, the accumulation of wiretap evidence naturally culminates in the prosecutor's decision to go to the grand jury for an indictment; in a security surveillance, the more information is obtained the greater incentive to continue the wiretap.[146] Furthermore, in a number of cases where warrantless wiretap was ostensibly for purposes of "gathering foreign intelligence information," the Government has nontheless brought criminal charges—thus effectively using the "national security" rationale to execute an avoidance of the warrant requirement.[147]

Second, the importance of the warrant requirement is heightened in the case of national and domestic security wiretaps because of the first amendment implications of these wiretaps. As a general proposition, the use of wiretapping inhibits free expression and free association by causing citizens to fear that their activities and thoughts will be subject to clandestine monitoring.[148] Justice Brennan addressed this issue in his dissenting opinion in *Lopez* v. *United States:*

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[144] One of the landmark English cases laid down the proposition that no one had the power to conduct a search "upon a bare suspicion." *Wilkes* v. *Wood*, 19 How. St. Tr. 1153 (1763).

[145] See *supra*.

[146] To those who would argue that a person suffers no harm if he is wiretapped without his knowledge, Congress has replied in title III by providing specifically for the recovery of civil damages. 18 U.S.C. § 2520.

[147] E.g., *United States* v. *Brown*, 484 F. 2d 418 (5th Cir. 1973); *United States* v. *Dellinger*, 472 F. 2d 340 (7th Cir. 1972), cert. denied, 93 S. Ct. 1443 (1973); *United States* v. *Clay*, 430 F. 2d 165 (5th Cir. 1970), rev'd on other grounds, 403 U.S. 698 (1971); *United States* v. *Hoffman*, 334 F. Supp. 504 (D.D.C. 1971).

[148] E.g., Note, The "National Security Wiretap": Presidential Prerogative or Judicial Responsibility, 45 S. Cal. L. Rev. 888, 894–95 (1972); Note, Eavesdropping at the Government's Discretion—First Amendment Implications of the National Security Eavesdropping Power, 56 Cornell L. Rev. 161, passim (1970); Note, Privacy and Political Freedom: Application of the Fourth Amendment to "National Security" Investigations, 17 U.S.C.A. L. Rev. 1205, 1211–17 (1970); Note, Eavesdropping and the Constitution: A Reappraisal of the Fourth Amendment Framework, 50 Minn. L. Rev. 378, 397–99 (1965); King, Electronic Surveillance and Constitutional Rights: Some Recent Developments and Observations, 33 Geo. Wash. L. Rev. 240, 261–67 (1964); King, Wire Tapping and Electronic Surveillance: A Neglected Constitutional Consideration, 66 Dick. L. Rev. 17, 24–30 (1961).

> Electronic surveillance strikes deeper than at the ancient feeling that a man's home is his castle; it strikes at freedom of communication, a postulate of our kind of society. . . . [F]reedom of speech is undermined where people fear to speak unconstrainedly in what they support to be the privacy of home and office.[149]

The "chilling effect" of wiretapping is particularly pronounced when the targets of official surveillance are those suspected of unorthodox political beliefs, and the danger of abuse is obvious.[150] Nor is this "chilling effect" less substantial by virtue of being psychological [151] or indirect.[152]

The first amendment alone does not provide a desirable constitutional framework for the treatment of wiretapping, because no discernible standards (such as fourth amendment probable cause) exist under the first amendment to indicate the limits of permissible encroachment on the freedom of expression.[153] However, in cases of national and domestic security wiretapping the presence of a threat to free speech enhances the importance of the fourth amendment protection.

> Few could gainsay the vital role of the protections of the fourth amendment in a free society, especially as they may guard against invasions of privacy of those suspected of unorthodoxy in matters of political belief and conscience.[154]

Similarly, the Supreme Court has construed the fourth amendment more strictly when the freedom of speech was at stake:

> [T]he constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain. . . . No less a standard could be faithful to First Amendment freedoms.[155]

For the reasons set forth in the foregoing discussion, it appears that the arguments in favor of an exception to the warrant requirement in cases of national and domestic security are unpersuasive, while the special threat to first amendment freedoms suggests that the need for prior review by an impartial magistrate is particularly compelling. Members of the committee who share this view may conclude at this juncture that, regardless of the factual circumstances, the 1969–71 wiretaps violated the fourth amendment. Other members may believe, however, that the danger of leaks through the court or the difficulty of demonstrating probable cause is a sufficient justification for dis-

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[149] 373 U.S. 427, 470 (1963) (Brennan, J., dissenting).

[150] Shortly after the 1969–71 wiretap program was initiated, Attorney General Mitchell announced that he considered the national security wiretapping power to be available against radical domestic dissident groups. New York Times, July 22, 1969, at 12, col. 1. The FBI later revealed that it had used this power in an intensive national investigation of the Black Panther Party. Id., Dec. 14, 1969, at 1, col. 1.

[151] E.g., *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (1958); in the fourth amendment context, cf. *Wolf* v. *Colorado*, 338 U.S. 25, 27 (1949) (fear of the ominous "knock at the door").

[152] The Supreme Court has been very sensitive to indirect threats to first amendment guarantees. E.g., *United States* v. *Robel*, 389 U.S. 258, 263 (1967); *Dombrowski* v. *Pfister*, 380 U.S. 479, 489–90 (1965); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 509 (1964); *Shelton* v. *Tucker*, 364 U.S. 479, 485–86 (1960); *Speiser* v. *Randall*, 357 U.S. 513 (1958); *Murdock* v. *Pennsylvania*, 319 U.S. 103, 113 (1943).

[153] Note, Eavesdropping and the Constitution: A Reappraisal of the Fourth Amendment Framework, supra note 148, at 398.

[154] Landynski, Search and Seizure and the Supreme Court: A Study in Constitutional Interpretation 264–65 (1966).

[155] *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965); cf. *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961). These cases involved the seizure of Communist literature and obscene books, respectively. Both opinions reviewed at length the English history which gave rise to the fourth amendment prohibition of unreasonable searches. The landmark cases involving general warrants also involved the prosecution of political dissenters for seditious libel, illustrating the interconnection of first and fourth amendment rights. *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (1765); *Wilkes* v. *Wood*, id. 1153 (1763).

pensing with the warrant requirement. That judgment does not end the fourth amendment inquiry, however, for it would still be necessary to consider whether the initiation and execution of the warrantless wiretaps satisfied the requirement of reasonableness. The following section is addressed to that issue.

*c. The Requirement of Reasonableness in a Warrantless Wiretap.*— It will be recalled that the rationale for permitting a warrantless search is that, due to "exigent circumstances," the purpose of the search would necessarily be frustrated if a warrant had to be obtained.[156] The fact that a warrant is not required, however, does not mean that the scope of permissible search is vested in the discretion of the law enforcement officer. Rather, "the scope of search must be strictly tied to and justified by the circumstances which rendered its initiation permissible." [157] In the case of a search incident to a valid arrest, for example, the search can extend no further than to the person arrested and objects in his immediate vicinity; i.e., no further than absolutely necessary to prevent the suspect from drawing a weapon or reaching to destroy evidence.[158] In other words, the scope of permissible search is defined by the same logic which permits that search to be undertaken without a warrant. But the only justifications which can be offered for permitting warrantless wiretaps—the danger of leaks and the difficulty of showing probable cause—are extrinsic to the nature and circumstances of the "search" itself. Once the exception to the warrant requirement has been admitted, therefore, the scope of permissible "search" is not limited by any internal logic.

In the case of a search incident to a valid arrest there is no difficulty in establishing these prerequisities of "reasonableness," since the circumstances have brought police scrutiny into sharp focus on a particular person, place, offense, and time. Warrantless electronic surveillance is entirely different, especially when carried on for purposes of gathering intelligence rather than for specific criminal prosecutions.

There is no case law directly in point on the question of what constitutes reasonableness in a warrantless wiretap. The reason for this lacuna is that the courts have been preoccupied with determining whether an exception to the warrant requirement should be permitted. Where they have answered this question in the negative, the failure to secure a warrant is dispositive of the case and there is no need to evaluate the reasonableness of the wiretap.[159] Conversely, where they have held that the warrantless wiretap was lawful, the invariable rationale has been that it was conducted to "gather foreign intelligence information." [160] In those cases the same rationale which justified the exception to the warrant requirement—the President's special powers and expertise in the conduct of foreign relations—ipso facto precluded any judicial inquiry into the reasonableness of the wiretap.

The scope of permissible warrantless surveillance must consequently be determined by reference to the standards which would govern a warrant application in the same case. A search is considered to be "reasonable" under the fourth amendment

[156] See discussion of exceptions to the warrant requirement, pp. 64–70, supra.
[157] *Terry* v. *Ohio*, 392 U.S. 1, 19 (1968).
[158] E.g., *Chimel* v. *California*, 395 U.S. 752, 762–74 (1969).
[159] E.g., *United States* v. *United States District Court*, 407 U.S. 297 (1972); *United States* v. *Smith*, 321 F. Supp. 424 (C.D. Cal. 1971).
[160] E.g., *United States* v. *Butenko*, 318 F. Supp. 66 (D.N.J. 1970); *United States* v. *Brown*, 317 F. Supp. 531 (E.D. La. 1970); *United States* v. *Clay*, 430 F. 2d 165 (5th Cir. 1970).

where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed.[161]

The fourth amendment also requires that the warrant must "particularly describ[e] the place to be searched, and the persons or things to be seized." [162]

In evaluating the reasonableness of a warrantless wiretap, there are two separate inquiries: whether there was probable cause for the initiation of the wiretap, and whether the execution of the surveillance was reasonable under the circumstances. As a general rule in ordinary search and seizure cases, a more rigorous standard of probable cause is applied to a warrantless search than to a proposed search for which a warrant is sought:

> Thus, when a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant." [163]

Probable cause for the initiation of the warrantless wiretap must be found with respect to three elements.[164] First, there must be probable cause for belief that a criminal offense has been, is being, or is about to be committed by a particular person. Second, there must be probable cause for belief that the wiretap will yield evidence concerning that offense. Third, there must be probable cause for belief that the premises to be wiretapped are being used in the commission of the offense, or are leased to or commonly used by the offender.

The requirement that there be probable cause to believe that a crime has been committed poses a threshold problem in the case of national and domestic security surveillances, which are often unrelated to ordinary criminal investigation.[165] For example, in the case of the 1969–71 wiretaps, the alleged leaking of confidential information by Government employees may not actually have constituted a crime; a fortiori, it is doubtful whether the receipt and publication of this information by newsmen was a crime.[166] f course, an argument can be made that in national or domestic security cases a statutory crime need not be alleged, because the offense is so grave—whether or not technically criminal—that wiretapping should be permitted.

Although section 2518(3) is not explicit on the point, it further appears that there must be probable cause to believe that the person whose telephone is tapped is also an offender. As interpreted in the

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[161] *Berger* v. *New York*, 388 U.S. 41, 55 (1967).

[162] A basic objection to all wiretapping under the fourth amendment is that it is obviously impossible to stipulate in advance that only certain conversations will be intercepted; that is, to describe with particularity the things to be seized. For example *United States* v. *U.S. District Court*, 407 U.S. 297, 333 n. 4 (1972), (Douglas, J., concurring). If wiretapping is to be permitted at all, the warrant clause must be liberally construed in this regard. One commentator has suggested that this liberal construction is the corollary of the liberal interpretation of "papers and effects" to include wire and oral communications. Kamisar, The Wiretapping-Eavesdropping Problem: A Professor's View, 44 Minn. L. Rev. 891, 912–13 (1960).

[163] *Aguilar* v. *Texas*, 378 U.S. 108, 111 (1964), quoting *Jones* v. *United States*, 362 U.S. 257, 270 (1960).

[164] *Cf.* 18 U.S.C. § 2518(3), setting forth the factual determinations which a judge must make in order to enter an order authorizing a wiretap under title III; see also 2 U.S. Code Cong. and Adm. News, 90th Cong., 2d sess. at 2177 (1968).

[165] Attorney General Saxbe recently explained the difficulty as follows: 'The problem is that under title III you have to allege probable cause. In other words, you have to allege a crime. And in intelligence work you can't always allege a crime." Senate subcommittee hearing, supra note 16, at 485 (May 23, 1974).

[166] See discussion of this issue, infra, note 181.

courts, the rule seems to be that it is lawful to intercept a telephone conversation if at least one of the parties has committed, is committing, or is about to commit an offense:

> If there is probable cause as to one of the parties to a conversation, * * * incriminating statements made by another party to the conversation can be intercepted and used even though probable cause is not established as to him.[167]

This holding thus rules out the possibility of wiretapping an admittedly innocent person in order to obtain information about others suspected of crime. Needless to say, the provisions of title III do not directly apply to the case of a warrantless wiretap; but the requirements spelled out in section 2518 were specifically drafted to reflect the constitutional principles enunciated in *Berger* and *Katz*, and therefore are a useful guide to the controling fourth amendment standards.

The 1969–71 wiretaps present a subtle analytical problem in regard to probable cause. The wiretapping was originally undertaken to determine the source of certain supposed leaks of classified information. A group of persons was subjected to surveillance on the ground that there was some reason to believe that the leaks had been perpetrated by one of their number.[168] In a case of this sort, if the group were small enough it might be argued that the mathematical probability of guilt on the part of any one member of the group was sufficient to satisfy the test of probable cause. Conversely, this surveillance method could be described as the deliberate infringement of the fourth amendment rights of a number of innocent persons in the hope of discovering one wrongdoer.

Another analytical problem which arises is whether the failure to discover incriminating evidence in the intercepted conversations of one group of suspects is sufficient probable cause to initiate wiretaps on a new group of suspects. From one perspective this approach might appear to be a logical application of the process of elimination. Viewed differently, it could be regarded as an excuse for an open-ended surveillance program with a more attenuated causal basis at each successive stage.

These examples are illustrative of the type of inquiry which might be made into the probable cause for initiating the wiretaps. The evaluation of the reasonableness of the surveillance must also take into account the manner in which it was executed in each case. Two factors for consideration are the extent to which an effort was made to minimize the interception of innocent, unrelated conversations; and whether the surveillance was continued too long.

In *Berger* v. *New York*, 388 U.S. 41 (1967), the Supreme Court voiced its deep concern with the indiscriminate interception of conversations and described the New York eavesdropping statute as follows:

> The statute's failure to describe with particularity the conversations sought gives the officer a roving commission to "seize" any and all conversations.[169]

In order to respond to this criticism, section 2518(5) of title III contains this provision:

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[167] *United States* v. *Tortorello*, 480 F. 2d 764, 775 (2d Cir. 1973).

[168] In the case of certain persons who were wiretapped, it may be questioned whether there was any reason to believe that they could have been the source of the leaks. See discussion in section IV, infra.

[169] 388 U.S. at 59.

Every order and extension thereof shall contain a provision that the authorization to intercept * * * shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter.

In *United States* v. *Scott*, 331 F. Supp. 233 (D.D.C. 1971), the Government monitored virtually 100 percent of the defendant's telephone calls, around the clock. Sixty percent of the calls were unrelated to his charge (narcotics violation), and were therefore not subject to interception. The court held that as a result it was obliged to suppress all the evidence obtained directly or indirectly from the wiretapping.[170] However, it is widely acknowledged that some interception of innocent telephone calls is inevitable. Section 2518(5) is satisfied if the law enforcement agents adopt reasonable procedures for screening out innocent calls, and if "on the whole the agents have shown a high regard for the right of privacy and have done all they reasonably could to avoid unnecessary intrusion." [171] Again, section 2518(5) does not apply directly to the case of a warrantless wiretap but offers guidelines for the application of relevant fourth amendment principles.

*Berger* also found the New York eavesdropping statute constitutionally objectionable in that it provided for too long an initial period of surveillance (2 months) on a single showing of probable cause, with extensions of equal length on a mere showing that they would be "in the public interest." [172] In addition, the statute provided for no termination date; this matter was left in the officer's discretion. In response to these objections, Congress enacted section 2518(5), which provides that each wiretap authorization shall automatically terminate as soon as the objective of the authorization has been achieved, except that in no case may an authorization exceed 30 days. The courts have strictly applied the 30-day limit,[173] and have frequently restricted the duration of the surveillance to less than the statutory maximum. Furthermore, the courts have also exercised a strong supervisory role, reviewing the wiretap evidence every 5 days in order to determine whether the authorization should be continued. In the light of the circumspect procedures followed in wiretap cases under title III, the 1969–71 wiretaps—most of which continued for many months, even years, with no periodic review—raise a strong inference of unconstitutionality.

### 5. THEORIES OF IMPLEACHMENT: PRO AND CON

#### *A. Arguments for Impeachment*

##### *1. Historical Precedent*

From 1940 until 1968, all wiretapping was subject to section 605 of the Federal Communications Act of 1934, which provided that "no person * * * shall intercept any communication and divulge * * *"

[170] Accord, *United States* v. *Focarile*, 340 F. Supp. 1033 (D. Md. 1972). But see *United States* v. *King*, 335 F. Supp. 523 (S. D. Cal. 1971), in which only the unlawfully seized conversations were suppressed. Accord, *United States* v. *Cox*, 462 F. 2d 1293 (8th Cir. 1972); *United States* v. *LaGorga*, 336 F. Sup. 190 (W.D. Pa. 1971); *United States* v. *Sklaroff*, 323 F. Supp. 296 (S.D. Fla. 1971). One might question the prophylactic value of an "exclusionary rule" which excludes only that evidence which would be harmless to the defendant.

[171] *United States* v. *Tortorello*, 480 F. 2d 764, 784 (2d Cir. 1973); quoted in *United States* v. *Bynum*, 360 F. Supp. 400, 409 (S.D. N.Y. 1973).

[172] 388 U.S. at 59–60.

[173] E.g., *United States* v. *Cafero*, 473 F. 2d 489 (3d Cir. 1973); *United States* v. *Focarile*, 340 F. Supp. 1033 (D. Md. 1972).

its contents to any other person.[174] This statutory language enacted a complete ban on all wiretapping by anyone, including Federal agents, regardless of whether or not the wiretap was intended to be used as evidence in a criminal trial. The Department of Justice took the position that section 605 did not prohibit interception per se, but only the combination of interception and divulgence; and that information obtained in a wiretap was not "divulged" if disclosure was confined to the Department. This interpretation was rejected by the Supreme Court in the two *Nardone* cases,[175] and it was rejected by other Federal agencies which might have engaged in wiretapping.[176] The only reason why the Department of Justice was not called to account for its illegal wiretapping from 1940 to 1968 is that because the wiretap evidence could not be used in court, many persons who were wiretapped probably never realized it; and those who were aware that they were being wiretapped had nothing to complain about.[177] However, the practice was nonetheless illegal and cannot, therefore, be relied on by President Nixon as a "precedent" for the 1969–71 wiretaps. The same argument was advanced in connection with general warrants 200 years ago, and was rejected by the court: "No degree of antiquity could give sanction to a usage bad in itself." [178]

Furthermore, prior to *Katz* in 1967 wiretapping was not considered to fall within the scope of the fourth amendment. Reliance on the 1940–68 practice of the Department of Justice, therefore, is singularly misplaced because the issue in the case of the 1969–71 wiretaps is not only whether they violated the applicable statutory law (title III) but also whether they violated the fourth amendment.

*2. Title III*

In the *Keith* case, seven Justices of the Supreme Court took the position articulated by Justice Powell, to the effect that section 2511 (3) was meant to be a "disclaimer" of congressional intent to legislate with respect to national and domestic security wiretapping.[179] However, the *Keith* decision was not rendered until 1972 and hence does not govern the 1969–71 wiretaps. Conversely, if *Keith* is accepted retrospectively as controlling authority for the interpretation of section 2511(3), it must also be accepted as authority with respect to the application of the fourth amendment. In other words, the President cannot select from *Keith* that part of the holding which supports his cause while rejecting the part which is adverse.

In any event, it is not clear from Justice Powell's opinion that the Court would go so far as to say that the mere assertion by the President of a national or domestic security interest of the sort described in section 2511(3) is per se sufficient to remove the case from the operation of title III. Nor is it clear that the President's judgment in this regard is not subject to judicial review, particularly in an egregious case where the alleged "national security" connection is very attenuated. Furthermore, even if it were appropriate for the courts not

[174] See discussion of sec. 605, pp. 11–17, supra.
[175] *Nardone* v. *United States*, 302 U.S. 379 (1937); *Nardone* v. *United States*, 308 U.S. 338 (1939).
[176] See note 28, supra.
[177] Prior to *Katz* (1967), nontrespassory wiretapping was not considered to be a violation of the fourth amendment.
[178] *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (1765).
[179] See discussion of sec. 2511(3), supra.

to question the President's decisions in this area, that inquiry is precisely the responsibility of the House in the exercise of its impeachment power.

Like Justice White in *Keith*, therefore, the Members must decide the threshold question whether the justification for the 1969–71 wiretaps was one of those set forth in § 2511(3). The only statutory justification which might apply is the President's power "to protect national security information against foreign intelligence activities." [180] The alleged leaks which prompted President Nixon to initiate the wiretapping program may have involved national security information, but not foreign intelligence activities.

Because the 1969–71 wiretaps cannot be brought within the criteria enunciated in § 2511(3), therefore, title III was fully applicable to the case. Viewed in this light, the wiretapping program was replete with statutory violations. First, in no instance was a court order obtained or even applied for, in violation of §§ 2516(1) and 2518 (1), (3), and (4). Second, it is questionable whether the alleged leaks even constituted a criminal offense of which title III may take cognizance. § 2516(1) provides that an application may be made and a court order granted only when the proposed wiretap may provide evidence of certain specified Federal crimes, none of which seems to apply to the leaking of sensitive information or to the receiving and publication of that information.[181] Third, the wiretaps extended longer than 30 days with none of the procedural safeguards of § 2518(5). These various statutory violations could be charged to the President by virtue of § 2511(1).

Furthermore, even if § 2511(3) should be interpreted as creating an exception to the statutory requirement of a court order, § 2517 would nonetheless be applicable to the disclosure and use of the information which was obtained through the 1969–71 wiretaps. The President is a "law enforcement officer" within the meaning of § 2517, so that his disclosure and use of the intercepted conversations must be "appropriate to the proper performance of his official duties." Use of wiretap information for purposes of spying on political opponents is presumptively improper and thus in violation of § 2517 (1) and (2).[182]

*3. Leaks as a Justification for Wiretapping*

It is seriously questionable whether leaks of classified information to the press can justify warrantless wiretapping at all. As previously observed, a leak does not necessarily constitute a violation of the criminal statutes. Nor is a leak of classified information necessarily a breach of national Security. This point was made by Senator Muskie at Kissinger's nomination hearing:

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[180] In the context of § 2511(3), information relating to domestic security matters is not national security information.

[181] The only statute which seems applicable is 18 U.S.C. § 793, "Gathering, transmitting or losing defense information." § 793(d) provides heavy criminal penalties for anyone who, "lawfully having possession of * * * any * * * information relating to the national defense, which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates * * * the same to any person not entitled to receive it * * *" § 793(e) refers to anyone who, "having unauthorized possession of * * * any * * * information relating to the national defense," and so forth. Daniel Ellsberg was indicted under both subsections.

[182] See discussion of the misuse of the 1969–71 wiretaps, pp. infra.

> I make a distinction between national security as a justification, and leaks. To close leaks and sources of leaks would require a surveillance effort that could be as wide as the 2½ million civil servants of this Government. If the closing of leaks is a sufficient justification, there is no limit.[183]

Similarly, former Deputy Attorney General William Ruckelshaus recently stated his opinion that leaks are "not a sufficient justification for a warrantless wiretapping." [184] He suggested that a far better approach is simply to discuss the matter with the particular newsman, because "newsmen will not publish that kind of information if they can be convinced that there is some legitimate national security problem involved." [185] Secretary Kissinger has candidly admitted that "there is no question that documents at this time are being overclassified," [186] and has offered the following forthright description of the effect of leaks:

> First, when one is new in Government leaks take on an extraordinary significance, because one has a sort of tendency to think that a top secret paper is inviolate, and when one suddenly sees the essence of it in the newspaper there is usually a rather strong reaction. . . . One has to be candid. This is sometimes out of proportion to the intrinsic damage that this particular leak may do, looked at in the long view.[187]

A particular leak of classified information must therefore be scrutinized carefully in order to determine whether it actually compromised national security. In the case of the 1969–71 wiretaps, for example, the leak—if in fact there was a leak—which triggered the wiretapping program had to do with the bombing of Cambodia. But there was no military reason for keeping the bombing secret (book VII, 299); nor were the air strikes a secret from the Cambodians, the Russians, the Chinese, or the U.S. military. Rather, the bombing of Cambodia was being kept secret from the American public, for political reasons. Thus the wiretaps which were installed to discover the source of the leak cannot be justified on the basis of national security.

*4. Exception to Fourth Amendment Warrant Requirement*

In the *Keith* case (1972), the Supreme Court held that there is no exception to the warrant requirements of the fourth amendment in domestic security wiretap cases.[188] The distinction between domestic and national security was drawn in terms of the absence of a "significant connection with a foreign power, its agents or agencies," [189] The factual circumstances of the 1969–71 wiretaps did not involve a significant connection with a foreign power. Halperin and newsman M had "had contact with Soviet nationals" and newsman P was apparently acquainted with persons at the Soviet embassy;[190] but in the absence of any evidence that these contacts were significant and played a part

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[183] Muskie testimony, Hearings Before the Senate Committee on Foreign Relations, Executive Session—September 17, 1973—at 325.

[184] Report of Proceedings, hearing held before Subcommittee on Administrative Practice and Procedure and Subcommittee on Constitutional Rights of the U.S. Senate Committee on the Judiciary, and the Subcommittee on Surveillance of the U.S. Senate Committee on Foreign Relations; vol. 4 [May 9, 1974] at 318 [hereinafter referred to as Senate Subcommittee Hearings—May 9, 1974].

[185] Id.

[186] Kissinger testimony, Hearings Before the Senate Committee on Foreign Relations, Executive Session [September 17, 1973], at 327.

[187] Id. 294.

[188] See discussion of *Keith*, supra.

[189] *United States* v. *U.S. District Court*, 407 U.S. 297, 309 n. 3 (1972).

[190] See supra.

in the leaks of sensitive information, they must be dismissed as irrelevant. Indeed, it is significant that Attorney General Saxby [191] and former Deputy Attorney General Ruckelshaus have both recently stated that the 1969–71 wiretaps would be illegal if judged in the light of the *Keith* decision.

Of course, the *Keith* decision was not handed down by the Supreme Court until a year and a half after the first wiretap had been terminated. Pending the definitive resolution by the Supreme Court, President Nixon was entitled to look to the decisions of the lower courts for guidance. The lower court cases decided during 1969–71, however, clearly foreshadowed the distinction between "national" and "domestic" security which the Supreme Court adopted in *Keith*.[192] The fact that a constitutional question is unsettled does not give the President the right to pursue with impunity a course of action which is quite likely to be found offensive to the Constitution, especially where basic individual rights and liberties are at stake. It is the lesson of history that a President who takes it on himself to decide thorny constitutional questions does so at his peril.[193]

If the 1969–71 wiretaps cannot be judged with reference to the subsequent Supreme Court decision in *Keith*, and if the existing lower court cases did not definitively decide whether there is an exception to the fourth amendment warrant requirement in wiretap cases involving national or domestic security, then the issue must be resolved in the light of fourth amendment principles. This question has been discussed at length already.[194] In short, the rule of necessity which governs the recognized exceptions to the warrant requirement in the ordinary search and seizure case does not apply to wiretaps. Nor is the supposed threat of leaks or the difficulty of demonstrating probable cause a sufficient justification for dispensing with the warrant requirement. On the contrary, the need to protect first amendment freedoms of speech and association is especially compelling in cases which affect the national or domestic security. For these reasons there can be no exception to the warrant requirement in those cases.

*5. Reasonableness of the "Search": Probable Cause*

Even if the proposition is accepted that national or domestic security wiretaps do not require warrants, it remains to inquire whether the wiretap was reasonable in execution as required by the fourth amendment.[195] The first requirement of reasonableness is that the initiation of the wiretap must be justified by a finding of probable cause.

In the case of the 1969–71 wiretaps, there was not probable cause to believe that the leaks of sensitive information were being performed by any of the 17 persons who were wiretapped—not even the 10 persons who concededly had access to the information (Pursley, Halperin, *B*, *O*, *C*, *I*, *A*, *H*, *K*, and *L*). The most likely suspect was Halperin,

[191] Senate Subcommittees Hearing (May 23, 1974), *supra* note 17, at 486–87. Saxbe specifically rejected the proposition that the disclosure of classified information to a newspaper is tantamount to foreign intelligence activity: "You would have to show more than just a desire to help a foreign power." Id. 486.

[192] See supra.

[193] President Johnson was impeached because, believing the Tenure of Office Act to be unconstitutional, he violated it by removing a Cabinet officer without Senate approval. Ironically, Johnson's view eventually prevailed in *Myers* v. *United States*, 272 U.S. 52 (1926).

[194] See supra.

[195] See supra.

but even in his case FBI Director Hoover regarded as only "speculation" the proposition that Halperin was responsible. Hoover further observed that there were 110 other likely suspects in the Systems Analysis Agency alone.[196] It was established 200 years ago in the great English cases that searches cannot be undertaken on the basis of mere suspicion.[197]

If it had been certain that the leaks were perpetrated by a member of a small and definable group, there might have been a justification for wiretapping all the members of that group. In the case of the 1969–71 wiretaps, however, the suspect group—if definable at all—was quite large and there could be no assurance that the wrongdoer was within the group. Thus instead of effectuating a process of elimination, the wiretapping program became an open ended and expanding dragnet operation.[198]

The absence of probable cause was even more egregious in the case of those persons who did not have access to the information leaked: the four newsmen and the three White House staff members. One of the newsmen, Beecher, was wiretapped because he had written articles which appeared to be based on classified information[199] and it was hoped that his conversation would reveal his sources. This approach has been criticized by former Deputy Attorney General Ruckelshaus, whose experience with wiretapping is derived from his stint as Acting Director of the FBI:

> [T]apping a telephone of a recipient or potential recipient of that information is so unlikely to produce the identification of the leakor, it would be an exercise in futility so far as I can see.[200]

There is no evidence that *P* and *M*, two of the other newsmen, were ever suspected of publishing stories based on leaks. Indeed, *P* had a reputation for not using leaked information.[201] *D* may have used leaks as a basis for news articles, but the rationale which Kissinger gave for ordering him to be wiretapped was that he had been in contact with other persons already under surveillance—a kind of guilt by association.[202] This indiscriminate surveillance on newsmen is especially pernicious because it threatens first amendment rights; as Ruckelshaus has stated, "it clearly raises the issue of constitutional chill or even prior restraints * * *." [203]

None of the White House staff members who were wiretapped had any access to the leaked information either. On August 31, 1973 an article in the New York Times reported an interview with *J*, who said that during his service to the Nixon administration he had known "absolutely nothing about national security" and that he was aston-

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[196] See supra.

[197] See note 77, supra.

[198] For example, the wiretapping of four persons (Pursley, Halperin, *B*, and *O*) initiated on May 12, 1969 did not result in narrowing down the inquiry to one or two; rather, a week later *C* and *I* were added, and within another 2 weeks *P* and *D*. See table 1, p. 19, supra.

[199] In fact, it appears that Beecher's industriousness and not a leak may have been the source of his May 9, 1969 article. See p. 30, supra.

[200] Senate Subcommittee Hearing (May 9, 1974), supra note 184, at 319. It will be recalled that there must be probable cause to believe not only that the suspect has committed a crime but also that the wiretap will yield evidence of that crime. See supra.

[201] See p. 29, supra.

[202] Id.

[203] Senate Subcommittee Hearing (May 9, 1974), supra note 186 at 321. As Justice Stewart said in *New York Times Co. v. United States*, "the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry * * *." 403 U.S. 713, 728 (concurring opinion).

ished to learn that he had been wiretapped. "Are you sure you've got the right guy?" he asked the Times interviewer.[204]

*6. Reasonableness of the "Search": Duration of Wiretap*

A wiretap authorized by court order under title III has a maximum duration of 30 days or until the objective is achieved, whichever occurs sooner. If an extension is sought, a new showing of probable cause must be made.[205] This provision was drafted in order to avoid the abuse which the Supreme Court held unconstitutional in *Berger* v. *New York:*

> [A]uthorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause. . . . Moreover, the statute permits, and there were authorized here, extensions of the original two-month period—presumably for two months each—on a mere showing that such extension is 'in the public interest.' . . . This we believe insufficient without a showing of present probable cause for the continuance of the eavesdrop.[206]

In the case of a warrantless national security wiretape, the FBI has a rule that the wiretap must be reviewed every 90 days in order to determine whether it is worth continuing.[207]

The 1969–71 wiretaps ran for months (in some cases, years) without any review of the original justification for the wiretap, whether or not the wiretap had achieved its objective, and whether or not there remained any justification for its continuation.[208] The Attorney General did not perform a 90-day review of any of the wiretaps.[209] The lengthy duration of the surveillance is the more surprising in view of the President's admission that the wiretaps did not yield any useful information.[210] Indeed, the FBI recognized as early as July 1969 that "nothing has come to light [from the initial group of wiretaps] that is of significance from the standpoint of the leak in question," and recommended terminating the wiretaps.[211] The wiretap on Halperin continued for 1 year and 7 months after the FBI had advised that it was useless for its intended purpose.[212]

*7. Reasonableness of the "Search": Interception of Innocent Conversations*

The 1969–71 wiretaps intercepted a large volume of purely irrelevant personal conversations, many having to do with intimate subjects (in President Nixon's words, "just gobs and gobs of material: gossip and bull shitting.)[213] It should be kept in mind that the wiretaps were placed on the home telephones of the persons involved, and so far as

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[204] Senate Subcommittee Hearing (May 9, 1974), supra note 186 at 321. It is revealing that the evidence submitted on behalf of the President only includes material concerning those persons for whose surveillance there was at least a colorable justification (Halperin, Pursley, *B*, *G*, *L*, and newsmen Beecher, *P*, and *D*). But in regard to the other nine persons wiretapped (*C*, *I*, *A*, *H*, *K*, *E*, *F*, *J*, and *M*) there is a telling silence. Statement of Information Submitted on Behalf of the President paragraph 26 (unpublished).

[205] 18 U.S.C. § 2518(5). Nor are extensions lightly granted, even in the case of wiretaps on the bosses of organized crime. Indeed, "the major purpose of title III is to combat organized crime." 2 U.S. Code Cong. and Adm. News, 90th Cong., 2d Sess. (1968), at 2157. With its attention thus focused, Congress deliberately provided in § 2518(5) for a surveillance period not to exceed thirty days. This is a statutory maximum, not an automatic authorization for continuous interceptions for 30 days. *United States* v. *Cafero*, 473 F. 2d 489, 495 (1973).

[206] 338 U.S. 41, 59 (1967).

[207] See supra.

[208] See table 2, supra.

[209] See supra.

[210] See p. 35, supra.

[211] See, supra.

[212] The wiretap on Halperin was useful for other purposes, however; see p. 124, infra.

[213] See supra.

can be determined no attempt was made to screen out conversations which were obviously innocent (for example, conversations of children.) Again, this abuse was held to be unconstitutional in *Berger:*

> New York's broadside authorization rather than being 'carefully circumscribed' so as to prevent unauthorized invasions of privacy actually permits general searches by electronic devices, the truly offensive character of which was first condemned in *Entick* v. *Carrington*, * * *, and which were then known as 'general warrants.' The use of the latter was a motivating factor behind the Declaration of Independence * * *. The Fourth Amendment's requirement that a warrant 'particularly describ[e] the place to be searched, and the persons or things to be seized,' repudiated these general warrants * * *.[214]

The fourth amendment requires that a serious effort be made to minimize the interception of irrelevant telephone calls. The correct procedure is exemplified by the guidelines which the officers devised for monitoring calls in *United States* v. *Tortorello*, 480 F. 2d 764, 783 (2d Cir. 1973). The factors taken into account included the identity of the caller, the guarded nature of the conversation, the topic of conversation, and the timbre of the speaker's voice. Children's conversations were not recorded. As soon as it was determined that a particular conversation was not pertinent, all interception immediately stopped. If this degree of punctiliousness must be observed in the case of ordinary criminals and gangsters, a fortiori it must be observed in the case of newsmen and Government officials.

*8. Use of Wiretap Information*

The original rationale for undertaking the wiretapping program was to protect the national security by discovering the source of leaks of classified foreign policy information. Eventually it became obvious that this objective would not be achieved.[215] At the same time, the wiretaps were generating a good deal of useful political intelligence, and it is a fair inference from the facts that the surveillance was continued for that reason long after the national security purpose had been abandoned.

For example, the continuation of the wiretaps on Halperin and L for many months after they had left the NSC makes very little sense from the standpoint of national security, but provided the White House with a source of inside information about the activities of Senator Muskie, for whom both Halperin and L worked as consultants after May 1970.[216] The wiretap on Halperin also revealed in advance the fact that former Secretary of Defense Clifford was planning a magazine article which would be a major attack on the Administration's conduct of the Vietnam war.[217] General Pursley's wiretap yielded no information about leaks but provided a source of information about a former Secretary of Defense, possibly Clifford, whose opposition to the President's conduct of foreign affairs was a matter of concern.[218] The surveillance of A revealed a meeting of dissident State Department officials and an aide to a "prominent Democratic Senator."[219] Several of the summaries of J's intercepted conversations refer to the election of a relative of his wife to an important Government position.[220]

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[214] 388 U.S. 41, 58 (1967).
[215] See supra.
[216] See supra.
[217] See supra.
[218] Book VII, paragraph 13.1 (unpublished).
[219] Id.
[220] Id. paragraph 11.1 (unpublished).

Nor was this political intelligence merely the incidental byproduct of a program still regarded as oriented to national security. The motives of the President in continuing the wiretapping program may readily be surmised from his decision of May 13, 1970 that henceforth Haldeman alone, instead of Kissinger and the President, should receive the FBI summaries.[221] That the purpose of the wiretapping had shifted from national security considerations to parochial political concerns was confirmed when, in response to Higby's request for "pertinent" information, the FBI supplied nothing but political and personal intelligence.[222]

The use of the FBI to conduct warrantless wiretapping in order to spy on political rivals and critics of the Administration is, in the abstract, an abuse of presidential power. In the specific case of Halperin and L, the surveillance constituted a serious invasion of individual rights guaranteed by the Constitution. After May of 1970 they were both private citizens with no remaining NSC connections and no access to classified information: in a word, they were no different from any other private citizen except for their association with Senator Muskie. It was no longer possible to argue that the purpose of these wiretaps was to discover the source of the leaks; for even if Halperin or L had been discovered as the perpetrator, no personnel action could have been taken nor could the evidence have been used to prosecute them for a crime.

*9. Concealment of Wiretap Records*

The question whether the 1969–71 wiretaps were governed by the warrant requirement of title III or of the fourth amendment is a complicated legal and constitutional question which the Supreme Court did not even address until *Keith* in 1972. Some might argue, therefore, that since reasonable men could have differed, it is a sufficient defense against impeachment that President Nixon made a judgment in good faith as to the legality of the wiretapping program.

If the President's decision was made in good faith, however, one may well ask why he took the unusual step of directing at the outset that no record of the wiretaps be kept in the FBI files and indices; and later the extraordinary measure of ordering Mardian to transfer the wiretap records from the FBI to the White House.[223] Quite apart from any criminal violations which may flow from these actions, the concealment or suppression of the wiretap evidence strongly suggests that the President was aware of the impropriety of the wiretapping program, both in concept and in execution.

*B. Arguments Against Impeachment*

*1. Historical Precedent*

The argument has been advanced that no reliance can be placed on the warantless wiretapping carried on by the Department of Justice between 1940 and 1968, because these wiretaps were in violation of § 605 of the Federal Communications Act of 1934. It is true that the two *Nardone* cases [224] support this view; in the first *Nardone* deci-

[221] See supra.
[222] See supra.
[223] See supra.
[224] *Nardone* v. *United States*, 302 U.S. 379 (1937); *Nardone* v. *United States*, 308 U.S. 338 (1939).

sion the Supreme Court held that "the plain words of § 605 forbid anyone * * * to intercept a telephone message." [225] There is language to the same effect in *United States* v. *Coplon*, 185 F. 2d 629, 636 (2d Cir. 1950).

However, the more modern view reaches a contrary interpretation of § 605 in cases which involve the national security. This view first found expression in *United States* v. *Stone*, 305 F. Supp. 75 (D.D.C. 1969), which is authority for the proposition that warrantless wiretapping for the purpose of gathering foreign intelligence information is not prohibited by § 605.[226] The court based its holding on the absence of legislative intent to ban this type of wiretapping, and the fact that the Supreme Court had never addressed the narrow issue of national security wiretapping under § 605.

This reasoning was more fully articulated in the majority opinion in *United States* v. *Butenko*, 494 F.2d 593 (3d Cir. 1974). Like *Stone*, *Butenko* involved wiretaps which had been conducted prior to the enactment of title III. Unlike *Stone*, in which the wiretaps were not relevant to the defendant's conviction, in *Butenko* the Government introduced in evidence the "fruits" of the wiretap. The court held that not only the interception but also the divulgence was permissible under section 605, where the wiretap was conducted in the foreign affairs field pursuant to executive order.[227] Nardone was distinguished because it involved the routine investigation of domestic criminals as opposed to foreign intelligence gathering. *Coplon*, a celebrated espionage case, was rejected as authority because the court in that case (Judge Learned Hand wrote the opinion) never addressed the precise question raised in Butenko. The court drew attention to the fact that there was virtually no discussion in Congress regarding section 605:

> The absence of legislative consideration of the issue does suggest that Congress may not have intended § 605 to reach the situation presented in the present case.[228]

The opinion concluded that the legislators simply did not consider the possible effect of section 605 in the foreign affairs field, and that the statute must therefore be read so as not to interfere with the President's various foreign policy powers.

In a sense, whether or not the prior practice of the Department of Justice was technically legal is academic. The practice was continued uninterruptedly and virtually unchallenged for nearly 30 years, under five Presidents and their Attorneys General. Under these circumstances it would be too much to expect President Nixon to play the devil's advocate against his own cause, by calling into question the legality of the investigative technique he was planning to use. Moreover, title III had recently been enacted and on its face appeared to represent a relaxation of the earlier statutory prohibition of wiretapping.

*2. Title III*

The majority opinion in the *Keith* case clearly rejects the proposition that a warrantless national security wiretap must first satisfy

[225] *Nardone* v. *United States*, 302 U.S. at 382.
[226] See also *United States* v. *Clay* 430 F. 2d 165 (5th Cir. 1970); *United States* v. *Hoffman*, 334 F. Supp. 504 (D.D.C. 1971).
[227] 494 F. 2d at 598.
[228] *Id.* 601.

the criteria of § 2511(3) and then be judged according to fourth amendment standards. Rather, when the President or the Attorney General deems electronic surveillance to be necessary for one of the reasons listed in § 2511(3), title III no longer has any application at all. Nothing in Justice Powell's opinion suggests that judicial review is or should be available to inquire into the soundness of the President's determination.

> If we could accept the Government's characterization of § 2511(3) as a congressionally prescribed exception to the general requirement of a warrant, it would be necessary to consider the question of whether the surveillance in this case came within the exception. . . . But . . . we hold that the statute is not the measure of the executive authority asserted in this case. Rather, we must look to the constitutional powers of the President.[229]

Justice Powell quite properly assumed that the President would not abuse his power thus to withdraw from the ambit of title III cases which bore no relation to national or domestic security; and if an abuse of this sort ever took place, the fourth amendment would render unconstitutional what the statute could not touch.

Nor can § 2517 stand by itself. The phrase, "by any means authorized by this chapter" clearly does not contemplate warrantless wiretaps as an authorized means. It could be argued, of course, that even a warrantless wiretap was "authorized" by § 2511(3). That section also states, however, that "*nothing* contained in this chapter * * * shall limit the constitutional power of the President to take such measures as he deems necessary * * *" [Emphasis supplied].

*3. "Leaks" as a Justification for Wiretapping*

Not every leak of classified information, to be sure, represents a bona fide threat to the national security. The 1969–71 wiretapping program, though triggered by Beecher's article of May 9, 1969, about the Cambodian bombing, was really a response to a whole series of news articles based on leaks during the spring of 1969.[230] Kissinger has described the effect of these leaks as follows:

> During this period, policies were being considered which would establish the fundamental approach to major foreign policy issues such as the United States' strategic posture, Strategic Arms Limitation Talks (SALT), Vietnam and many other national security issues. Because of the sensitive nature of these matter, the secrecy of each was of vital importance and the success or failure of each program turned in many instances upon the maintenance of the necessary security. These leaks include discussions of National Security Council deliberations, intelligence information, negotiating positions and specific military operations. In several cases, significant consequences resulted from these premature releases of internal policy deliberations. In addition, the release of such classified information had obvious benefit for the potential enemies of this country. Of particular concern to the President were news leaks which occurred from early April until June 1969, involving Vietnam policy, strategic arms and the Okinawa reversion. "Statement of Information Submitted on Behalf of President Nixon," book IV, 143–44.

The first leak was reflected in articles published in the New York Times on April 1 and April 6, 1969, indicating that the United States was considering unilateral withdrawal from Vietnam. Kissinger stated that these disclosures were "extremely damaging" in that they "raised

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[229] *United States* v. *U.S. District Court*, 407 U.S. 297, 308 (1972). As the court observed in *United States* v. *Butenko*, 494 F. 2d 593, 600 n. 25 (3d Cir. 1974):

"With the passage of the Omnibus Crime Control and Safe Streets Act of 1968, it appears that the only limitations on the President's authority to engage in some forms of electronic surveillance are those set forth in the Constitution."

[230] See p. 21, supra.

a serious question as to our reliability and credibility as an ally" and "impaired our ability to carry on private discussions with the North Vietnamese" (Statement of Information Submitted on Behalf of President Nixon," book IV, 145).

The second leak was the basis for an article of May 1, 1969, in the New York Times reporting the five strategic options under study for the SALT negotiations; these options were published before they were considered by the NSC. Kissinger said that this disclosure was "of the most extreme gravity" because it revealed the apparent inability of U.S. intelligence to assess accurately the Soviet missile capability; and because it "raised serious questions as to the integrity of the USIB and created severe doubts about our ability to maintain security * * *" ("Statement of Information Submitted on Behalf of President Nixon," book IV, 171–72).

The third leak allegedly resulted in Beecher's May 9, 1969, article revealing the air strikes in Cambodia. This article had "obvious adverse diplomatic repercussions," according to Kissinger, and raised "a serious question in the mind of the President as to * * * whether in the future he could make critical foreign policy decisions on the basis of full and frank discussion" ("Statement of Information Submitted on Behalf of President Nixon," book IV, 165).

The fourth leak produced a New York Times article of June 3, 1969, reporting that the President had determined to remove nuclear weapons from Okinawa in the upcoming negotiations with Japan over the reversion of the island. This decision had not yet been formally communicated to Japan. Kissinger stated that this article compromised negotiating tactics, prejudiced the Government's interests, and complicated our relations with Japan; and that it "clearly preempted any opportunity we might have had for obtaining a more favorable outcome" from the negotiations ("Statement of Information Submitted on Behalf of President Nixon," book IV, 182).

The fifth leak was the foundation for articles on June 3 and 4, 1969 in the Washington Evening Star and the New York Times reporting the President's decision to begin withdrawing troops from Vietnam before this decision had been communicated to the South Vietnamese. Kissinger characterized these disclosures as "extremely damaging with respect to this Government's relationship and credibility with its allies ("Statement of Information Submitted on Behalf of President Nixon," book IV, 159).

*4. Exception to Fourth Amendment Warrant Requirement*

The decision of the Supreme Court in *Keith* does not apply to the 1969–71 wiretaps, because that case was not decided until 1972. During the period in question there was very little applicable case law to which the President could look for guidance. Indeed, as of May 1969 none of the lower courts had addressed the question whether the fourth amendment permitted an exception to the warrant requirement in wiretap cases involving national or domestic security.[231] The first case which dealt with this issue was *United States* v. *Brown*, 317 F. Supp. 531 (E.D. La. July 1970) aff'd. 484 F. 2d 418 (5th Cir. 1973), which upheld the validity of the warrantless wiretaps:

[231] *United States* v. *Stone*, 305 F. Supp. 75 (D.D.C. September 1969) and *United States* v. *Clay*, 430 F. 2d 165 (5th Cir. July 1970) are admittedly not on point because in both cases the wiretaps antedated *Katz*, so the fourth amendment was inapplicable.

> The surveillances here in question should be declared lawful on the ground that they were authorized by the President or the Attorney General for the purpose of national security.[232]

This proposition laid down in *Brown* has not been affected by subsequent decision except to the extent that *Keith* limited the scope of "national security" matters to those which have a "significant connection with a foreign power, its agents or agencies." [233]

Even if that limitation were retrospectively applied to the case of 1969–71 wiretaps, they would meet the test of a "significant connection." For the effect of disclosure of classified information in the news media and its transmittal to some foreign power for subsequent use against this country is clearly equivalent to the effect of the operations of a foreign intelligence service. Whether the information is leaked to the newspapers or covertly transmitted to a foreign agent is immaterial, since the result is the same in both cases.

In any event, as of 1969–71 the *Keith* distinction between national and domestic security had not been authoritatively formulated. The wrietapping program initiated by the President may have raised constitutional issues, but in that event he deserved to have his actions tested in the Supreme Court. It would be an abuse of the impeachment power to impeach the President for a decision made in good faith, where circumstances of compelling urgency favored a program whose constitutionality was not questioned by clear authority.

Reliance on the principles which justify warrantless searches can be misleading if those principles are applied indiscriminately to the case of national security wiretaps. In the 1969–71 wiretaps there was admittedly no urgent immediacy, such as exists in a search incident to an arrest; the delay involved in obtaining a court order was not a factor in the President's decision. In view of the fact that the need for electronic surveillance arose because of leaks of confidential information by government officials, it is understandable that the President was anxious lest the effectiveness of the wiretapping program itself should be compromised by further leaks. His decision not to apply for court orders was therefore justified by his realistic fear that the purpose of the wiretaps would be frustrated unless their very existence was known only to a handful of trusted subordinates: Mitchell, Kissinger, Haldeman and his administrative assistant, Ehrlichman, Hoover and a few other top FBI officers.

*5. Reasonableness of the "Search": Probable Cause*

A wiretap cannot be initiated, with or without a warrant, unless there is probable cause. In the ordinary criminal context this phrase means probable cause to believe that the suspect has committed, is committing, or is about to commit a crime. In other contexts, however,

> the standard may be modified when the government interest compels an intrusion based on something other than a reasonable belief of criminal activity * * * [234]

In the case of noncriminal administrative searches, for example, specific probable cause is often not determinable, and no warrants for

[232] 317 F. Supp. at 535.

[233] *United States* v. *U.S. District Court*, 407 U.S. 297, 309 n. 3 (1972). *Cf. United States* v. *Butenko*, 318 F. Supp. 66 (D.N.J. 1970), aff'd. 494 F. 2d 593 (1974); *United States* v. *Hoffman*, 334 F. Supp. 504 (D.D.C. 1971); *United States* v. *Dellinger*, 472 F. 2d 340 (7th Cir. 1972); *Zweibon* v. *Mitchell*, 363 F. Supp. 936 (D.D.C. 1973).

[234] *United States* v. *Butenko*, 494 F. 2d 593, 606 (3d Cir. 1974).

this type of search could issue if the traditional showing of probable cause were required.[235] Likewise, in the case of wiretaps initiated for the purpose of intelligence gathering rather than criminal prosecution, it is reasonable to take into account the function of the search in applying a standard of probable cause.

During the course of the 1969–71 wiretaps 17 persons were placed under electronic surveillance. Seven of these persons were employees of the National Security Council (Halperin, B, O, C, I, L, and K); two were State Department officials (A and H); and one was at the Department of Defense (General Pursley). All 10 had access to the classified information which was leaked, and it is therefore beyond argument that sufficient probable cause existed to justify the surveillance of these persons.

Four were newsmen, at least two of whom (Beecher and D) were known to have published newspaper articles, based on leaks, which were extremely damaging to the effectiveness of U.S. foreign policy initiatives. The other two newsmen (M and P) were known to have frequent contact with Soviet-bloc personnel; though perhaps not in itself a sufficient reason to justify wiretapping, this fact must be considered as an aggravating factor under the circumstances.

With respect to the three remaining persons who were wiretapped (White House staff members E, F, and J), it is true that none of them had direct access to classified foreign policy information. It is possible, however, that any one of these persons might have inadvertently come into possession of this type of information simply by virtue of their close contact with other White House personnel. For example, E was an aide to John Ehrlichman, one of the President's closest confidantes. In any event, even if there was not a sufficient showing of probable cause to justify wiretapping these three persons, the entire wiretapping program cannot be condemned simply because of an inadvertent and good faith error in judgment with respect to 2 or 3 of the 17 persons who were placed under surveillance. It is appropriate to keep in mind that the decisions as to which persons should be wiretapped were made, for the most part, in the context of an emergency situation.

It should also be recalled that in each of the 17 cases the decision to place a wiretap was reviewed by FBI Director Hoover and specifically authorized by Attorney General Mitchell. Both of these men were better qualified than the President to judge the legality of a particular wiretap, and the President properly relied on them to warn him if there was not a sufficient legal basis for one of the surveillances.

*6. Reasonableness of the "Search": Duration of Wiretaps*

There is no denying that the 1969–71 wiretaps, by and large, were maintained for longer periods of time than is customary in the case of ordinary criminal investigations. However, the wiretapping program was no ordinary criminal investigation; it was undertaken in response to a serious and ongoing threat to the national security. When a title III wiretap is used as a weapon against organized crime, because of the inherent nature of the activity being monitored the wiretap will usually achieve its objective or prove unsuccessful within a relatively short time. The opposite is apt to be true of intelligence surveillance, whose purpose is not simply to accumulate a critical mass

[235] E.g., *Adams* v. *Williams*, 407 U.S. 143 (1972); *Camara* v. *Municipal Court*, 387 U.S. 523 (1967).

of incriminating evidence sufficient to obtain an indictment. One of the major purposes of the 1969–71 wiretaps, in President Nixon's words, was to "tighten the security of highly sensitive materials" (book VII, 147). This is an objective which can never be completely achieved; rather it is a continuous process. Viewed in this light, the lengthy duration of the wiretaps may be regarded as a rational and justifiable means toward that end.

*7. Reasonableness of the "Search": Interception of Innocent Conversations*

It may also be true that the 1969–71 wiretaps intercepted a number of conversations which turned out to be irrelevant or innocent. Again, this was not an ordinary criminal investigation. For example, a typical title III wiretap might have to do with gambling or narcotics activities. In cases of that sort, it can be determined without great difficulty whether a particular conversation does or does not involve the criminal conduct under investigation. By contrast, a surveillance whose purpose is to gather intelligence must be attentive to many details of conversation which, on their face, have nothing to do with the subject of the "search." Subtle nuances of meaning or inflection which would not constitute admissible evidence at a criminal trial may provide vital clues toward the resolution of a national security problem.

Furthermore, even in criminal cases the courts have differed widely as to the seriousness of a failure to minimize the interception of irrelevant conversations. Some courts have held that it requires the exclusion of all the wiretap evidence, whether relevant or not; [236] other courts have excluded only the wrongfully seized conversations.[237] While the excessive interception of irrelevant conversations is unconstitutional under *Berger* v. *New York*, it may be doubted whether this abuse is of comparable gravity to the failure to obtain a warrant. In short, this defect of the 1969–71 wiretapping program is not sufficiently important to warrant the removal of a President from office.

*8. Use of Wiretap Information*

Much has been made of the fact that in a handful of isolated instances the wiretaps yielded information which was of incidental political usefulness to the President. This has not been shown to be anything more than an accidental byproduct of surveillance undertaken for a different and proper purpose, nor can such a showing be supported by the facts.

The wiretapping program has also been criticized because the identity of the source of the leaks was not discovered, and because no prosecutions or personnel actions were taken as a result of information generated by the wiretaps. But these conclusions do not necessarily follow from the facts, nor do they hold any significance even if true. The objective of the wiretapping program was not to provide the basis for criminal prosecutions nor even to bring about the removal of untrustworthy Government employees, but rather to tighten the security of classified information. Three NSC staff members (Halperin, L, and O) resigned while they were under surveillance; one or more of these persons may have been the source of the leaks, in which

[236] E.g., *United States* v. *Scott*, 331 F. Supp. 233 (D.D.C. 1971).
[237] E.g., *United States* v. *King*, 335 F. Supp. 523 (S.D. Cal. 1971).

case an objective of the wiretaps would have been accomplished without any visible governmental action.[238] Similarly, information yielded by the wiretaps may have resulted in the institution of new procedures designed to improve security; this result would not be highly visible either, but would nonetheless vindicate the usefulness of the surveillance.

It has been asserted that there could have been no proper purpose for wiretapping Halperin and L after May, 1970, since the Government would not have been able after that date to take personnel action or to bring criminal prosecution against them. It is not necessarily true, however, that these ex-NSC employees could not have been prosecuted on the basis of evidence obtained through the warrantless wiretaps. If the wiretap was justifiable for the purpose of protecting classified information against foreign intelligence operations (if, for example, even after leaving the NSC Halperin and L still possessed certain secret information), then some courts have suggested that incriminating evidence obtained incidentally in the course of the surveillance is admissible at a criminal trial:

> Since the primary purpose of these searches is to secure foreign intelligence information, a judge, when reviewing a particular search must, above all, be assured that this was in fact its primary purpose and that the accumulation of evidence of criminal activity was incidental.[239]

*9. Concealment of the Wiretap Records*

The allegation that President Nixon ordered the records of the 1969–71 wiretaps not to be entered in the FBI indices is based on the following excerpt from an internal FBI memorandum of May 11, 1969:

> Haig came to my office Saturday to advise me the request [for wiretaps on Halperin, Pursley, B, and O] was being made on the highest authority and involves a matter of most grave and serious consequence to our national security. He stressed that it is so sensitive it demands handling on a need-to-know basis, with no record maintained (book VII, 189).

As evidence of what the President may have ordered, this statement is hearsay upon hearsay. Furthermore, it is wholly ambiguous. First, it is not clear whether "the highest authority", which may be understood to refer to the President, is meant to govern the second sentence as well as the first. Second, even if the President had directly ordered the FBI "to handle the case on a need-to-know basis, with no record maintained," this would not justify the conclusion that he intended the FBI to act in dereliction of its legal duty to maintain such wiretap indices as are necessary to supply logs of conversations to the courts in *Alderman* "taint" hearings.[240] The President may not even have been aware of this duty, much less what specific procedures (the ELSUR index) were customarily employed by the FBI to discharge the duty. These are the responsibilities of the Director of the FBI, on whom the President properly relied to carry out his orders in an appropriate and legal manner.

The failure to maintain records of the wiretaps on the FBI indices, and the subsequent retrieval of all the 1969–71 wiretap records from

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[238] Indeed, there is substantial evidence that O did not voluntarily resign, but was dismissed. For example, in an intercepted conversation he mentioned that his employment on the NSC staff was being terminated because he had been seeing reporters. (Statement of Information, Book VII, paragraph 7.1, unpublished).

[239] *United States* v. *Butenko*, 494 F. 2d 593, 606 (3d Cir. 1974).

[240] See supra.

the FBI, have been cited as evidence of the President's awareness that the wiretapping program might be illegal. This inference is rebutted, however, by a more compelling inference that the President's actions had an innocent motivation. Whatever his precise instructions to Haig may have been the President was understandably anxious to take all appropriate measures which would ensure that the existence of the wiretaps would not, through leaks, become known to the very persons on whom the surveillance had been placed. The recovery of the wiretap records from the FBI in July 1971 was motivated by the allegation of William Sullivan, Assistant to the Director, that Director Hoover intended to use those records for an improper purpose (book VII, 757). No doubt the President was skeptical about this allegation, but felt that no harm would be done by taking prophylactic action.

*10. Termination of the Wiretaps*

All of the wiretaps still in force, of which there were nine, were terminated on February 10, 1971. There is no apparent reason for this abrupt and total discontinuation of the wiretapping program. It may be noted, however, that in January 1971 two separate district courts held, for the first time, that there is no exception to the warrant requirement of the fourth amendment in the case of domestic security wiretaps.[241] Prior to *Smith* and *Sinclair*, the lower courts had uniformly upheld warrantless national security wiretapping, but the earlier cases had all involved wiretaps for the gathering of foreign intelligence so that there had been no need to draw the distinction between domestic and national security.[242] If the President's opinion as to the legality of the wiretapping program had previously been influenced by the decisions of the lower courts, the termination of the wiretaps shortly after the decisions in *Smith* and *Sinclair* might be considered evidence of his willingness to abide by the law.

[241] *United States* v. *Smith*, 321 F. Supp. 424 (C.D. Cal. Jan. 8, 1971); *United States* v. *Sinclair*, 321 F. Supp. 1074 (E.D. Mich. Jan. 26, 1971). *Sinclair* was decided by Judge Keith and became popularly known as the *Keith* case.

[242] See supra.

## The Huston Plan

### *A. Facts*

On June 5, 1970, the President held a meeting with FBI Director J. Edgar Hoover, Defense Intelligence Agency Director Donald Bennett, National Security Agency Director Noel Gayler, and Central Intelligence Agency Director Richard Helms. (Book VII, 375.) Also present were H. R. Haldeman, John Ehrlichman, and Presidential Staff Assistant Tom Huston. (Book VII, 375.) The President discussed the need for better domestic intelligence operations in light of an escalating level of bombings and other acts of domestic violence. (Book VII, 22.) The President asked the Intelligence Agency directors for their recommendations on whether the Government's intelligence services were being hampered by restraints on intelligence gathering methods. Huston has testified that it was the opinion of the directors that they were in fact being hampered. (Book VII, 378.) The President appointed Hoover, General Bennett, Admiral Gayler, and Helms to be an ad hoc committee to study intelligence needs and cooperation among the Intelligence agencies, and to make recommendations. Hoover was designated Chairman and Huston served as White House liaison. (Book VII, 22.)

On June 25, 1970, this ad hoc committee completed its report, entitled "Special Report Interagency Committee on Intelligence (Ad Hoc)" (hereafter "Special Report").

The first page of the Special Report, immediately following the title page, bore the following notation:

"June 25, 1970.

This report, prepared for the President, is approved by all members of this committee and their signatures are affixed hereto.

/s/ J. Edgar Hoover,
Director, Federal Bureau of Investigation, Chairman,
/s/ Richard Helms,
Director, Central Intelligence Agency,
/s/ Lt. General D. V. Bennett, USA,
Director, Defense Intelligence Agency,
/s/ Vice Admiral Noel Gayler, USN,
Director, National Security Agency."

(Book VII, 385)

Part one of the Special Report, entitled "Summary of Internal Security Threat," was a length threat assessment, including assessments of the current internal security threat of various domestic groups, of the intelligence services of communist countries, and of other revolutionary groups. (Book VII, 389–410.)

Part two, entitled "Restraints on Intelligence Collection," was a discussion of official restraints under which six types of U.S. intelligence collection procedures operated, and of the advantages and disadvantages of continuing or lifting such restraints. (Book VII, 411–29.)

Part three, entitled "Evaluation of Interagency Coordination," assessed the degree of coordination between the Intelligence Agencies and recommended means to improve it. (Book VII, 430–31.)

Although the Special Report took no position with respect to the alternative decisions listed, it included statements in footnotes that the FBI objected to lifting the restraints discussed, except those on legal mail coverage (keeping a record of the return address of communications addressed to an individual) and National Security Agency communications intelligence. (Book VII, 416, 419, 421, 424, 427.)

During the first week of July, 1970, Huston sent the special report, together with a memorandum entitled "Operational Restraints On Intelligence Collection," to Haldeman. In the memorandum Huston recommended that most, although not all, of the present procedures imposing restraints on intelligence collection activities should be changed. Huston's recommendations included the following:

"*Electronic Surveillances and Penetrations.*

*Recommendation:*

Present procedures should be changed to permit intensification of coverage of individuals and groups in the United States who pose a major threat to the internal security.

. . . *Mail Coverage.*

*Recommendation:*

Restrictions on legal coverage should be removed.

ALSO, present restrictions in covert coverage should be relaxed on selected targets of priority foreign intelligence and internal security interest.

*Rationale:* . . . Covert coverage is illegal and there are serious risks involved. However, the advantages to be derived from its use outweigh the risks. This technique is particularly valuable in identifying espionage agents and other contacts of foreign intelligence services.

*Surreptitious Entry.*

*Recommendation:*

Present restrictions should be modified to permit procurement of vitally needed foreign cryptographic material.

ALSO, present restrictions should be modified to permit selective use of this technique against other urgent and high priority internal security targets.

*Rationale:*

Use of this technique is clearly illegal: it amounts to burglary. It is also highly risky and could result in great embarrassment if exposed. However, it is also the most fruitful tool and can produce the type of intelligence which cannot be obtained in any other fashion.

The FBI, in Mr. Hoover's younger days, used to conduct such operations with great success and with no exposure. The information secured was invaluable. (Book VII, 438–40)

On July 14, 1970, Haldeman sent a memorandum to Huston stating: "The recommendations you have imposed as a result of the review have been approved by the President. . . . The formal official memorandum should, of course, be prepared and that should be the device by which to carry it out." (Book VII, 447.)

On July 23, 1970, Huston sent a "decision memorandum" entitled "Domestic Intelligence" to each of the Directors of the four Intelligence Agencies, informing them of the options approved by the President. (Book VII, 454.)

Shortly after the decision memorandum of July 23, 1970, had been received by Mr. Hoover, Huston received a telephone call from Assistant FBI Director William Sullivan indicating that Hoover had been very upset by the decision memorandum, and that Hoover either had

talked or intended to talk to the Attorney General to undertake steps to have the decisions reflected in the memorandum reversed. (Book VII, 470.) On or before July 27, 1970. Director Hoover met with Attorney General Mitchell, who joined with Hoover in opposing the recommendations contained in the memorandum of July 23, 1970. (Book VII, 463.)

Shortly after his telephone conversation with Sullivan, Huston received a call from Haldeman indicating that the Attorney General had talked to the President, or that Haldeman had talked to the Attorney General and then to the President, but that, in any event, Huston was instructed to recall the decision memorandum; that the President desired to reconsider the matter, and that Haldeman, Hoover, and the Attorney General would have a meeting in the near future to discuss the matter. (Book VII, 470.)

Huston arranged for the recall of the document through the White House Situation Room (Book VII, 470. Copies of the decision memorandum on "Domestic Intelligence" were returned by each of the four Intelligence Agencies to the White House Situation Room on or about July 28, 1970. (Book VII, 472, 474.) Although Huston continued to press for adoption of his recommendations (Book VII, 480–85), the plans for lifting operational restraints on intelligence collection activities were not reinstituted.[1]

*B. Discussion*

1. With respect to electronic surveillances and penetrati , the Special Report of the Interagency Committee stated, "Th President historically has had the authority to act in matters of national security. In addition, title III of the Omnibus Crime Control and Safe Streets Act of 1968 provides a statutory basis." (Book VII, 415.) The Special Report also stated that routine mail coverage was legal. (Book VII, 417.) Other intelligence collection activities, such as development of campus sources, appeared to present political rather than legal questions.

However, with respect to both covert mail coverage and surreptitious entry, both the Interagency Committee's Special Report and the "Operational Restraints" memorandum prepared by Huston stated that such intelligence collection activities were illegal. (Book VII, 418, 420, 439, 440.) The President's approval of Huston's recommendations in these areas may consequently be viewed as approval of otherwise illegal actions by government agencies.

2. The Special Report was prepared by a committee consisting of intelligence professionals from each of the four intelligence agencies. Although it did not make recommendations, it listed as options the relaxation or removal of restrictions on all categories of intelligence collection activities. The recommendations made by Huston in the "Operational Restraints" memorandum are taken verbatim from among the options listed by the Special Report of the Interagency Committee; they do not go beyond options listed by the committee.

[1] In or before December, 1970, when John Dean had assumed responsibility for matters of domestic intelligence for internal security purposes, an Intelligence Evaluation Committee was created to improve coordination among the intelligence community and to prepare evaluations and estimates of domestic intelligence. (Book VII, 487, 497). This step may be seen as an outgrowth of the recommendations in part three of the Special Report, entitled "Evaluation of Interagency Coordination." (Book VII, 430–31).

The Special Report was approved by all members of the committee, consisting of the directors of the four intelligence agencies, and their signatures were affixed to the first page. This approval might have been taken by Haldeman or by the President to indicate that the options listed were not regarded as improper by the professional U.S. intelligence community, despite the footnoted objections of Mr. Hoover contained in the body of part 2 of the special report.

3. The options of lifting restraints on intelligence gathering activities, listed in part 2 of the Special Report were intended to be taken in the context of the threat assessment contained in part 1 of the Special Report. There had been a substantial number of bombings and riots in the spring and summer of 1970. (Book VII, 377.) Part 1 stated that Communist intelligence services possessed a capability for actively fomenting domestic unrest, although it also stated that there had been no substantial indications that this had yet occurred. (Book VII, 402.)

4. The recommendations by Huston contained in the memorandum entitled "Operational Restraints on Intelligence Collections" are cast in general terms, that is, "present procedures should be changed" (electronic surveillance), or "relaxed" (mail coverage), or "modified" (surreptitious entry). (Book VII, 438–39.) Much might have depended upon how the modifications might have been implemented.

5. The President's approval in principle of modifying some operational restraints which had been in existence since 1966 was withdrawn within 5 days after the circulation of Huston's decision memorandum, which was the device for carrying out the recommendations. (Book VII, 447, 472, 474.) There is no evidence before the committee that any illegal mail coverage, surreptitious entry, or electronic surveillance or penetration was ever undertaken, during these 5 days, under the authority of the decision memorandum.

6. It has occasionally been urged that the formation and operation of the "Plumbers" group is evidence that the Huston plan was not actually rescinded. This is untenable. The two matters were handled by entirely different groups of White House staff members and they arose a year apart. The problem to which the Huston plan was directed was, essentially, domestic violence, whereas the "Plumbers" were concerned with news leaks and the theft of the Pentagon Papers. It strains the facts to find any connection between the two.

## Internal Revenue Service

### *A. Facts*

The following discussion concerns whether the President has committed acts of abuse of power in connection with the misuse of the Internal Revenue Service by obtaining confidential tax information from the IRS, and endeavoring to have the IRS initiate or accelerate investigation of taxpayers.

*1. Report on Gerald Wallace Investigation*

On or about March 21, 1970, Special Counsel to the President Clark Mollenhoff transmitted to H. R. Haldeman material obtained by Mollenhoff from the IRS and dealing with the taxes of Gov. George Wallace's brother, Gerald Wallace. (Book VIII, 35) Mollenhoff had been instructed by Haldeman to obtain a report from the IRS on an investigation relating to Gov. George Wallace and Gerald Wallace, on assurances by Haldeman that the report was to be obtained at the request of the President. Mollenhoff states that he neither gave copies to anyone else nor discussed the substance of it with anyone else after the appearance of a news article on April 13, 1970, that described confidential field reports and the IRS's investigation of charges of corruption in the Wallace administration and the activities of Gerald Wallace. (Book VIII, 38–39).

Former Commissioner of Internal Revenue Randolph Thrower has stated that an IRS investigation of the leak of information concluded that the material had not been leaked by the IRS or the Treasury Department. In an affidavit submitted to the committee, Thrower has also stated that thereafter he and the IRS Chief Counsel met with Haldeman and Ehrlichman at the White House and discussed with them the seriousness of the leak and the fact that unauthorized disclosure of IRS information constituted a criminal act. Neither Haldeman or Ehrlichman indicated to Thrower the source of the leak, but they did appear to take the complaint seriously and assured Thrower that they would cooperate in undertaking to prevent such incidents in the future. Further, Haldeman and Ehrlichman assured Thrower that they would call the gravity of the situation to the attention of those in the White House who might from time to time have access to such information. (Book VIII, 40–42).

*2. Enemies List*

In an affidavit submitted to the committee, Johnnie Walters, former IRS Commissioner, has stated that on September 11, 1972, at Dean's request, he went to John Dean's office where he received from Dean a list of McGovern staff members and campaign contributors. Dean requested that the IRS begin investigations or examinations of the individuals named on the list. Dean said he had not been asked by the President to have this done, and that he did not know whether the

President had asked this action to be undertaken. (Book VIII, p. 240) Walters advised Dean that compliance with such a request would be disastrous for the IRS and the administration—"would make the Watergate affair look like a 'Sunday school picnic' "—and that he intended to discuss the matter with Secretary of the Treasury George Shultz and recommend to Shultz that nothing be done on the request. (Book VIII. 275–79) Dean has testified that he was instructed to give this list to Walters by either Murray Chotiner of John Ehrlichman. Dean testified that he learned that Chotiner had collected the names of all the principal contributors in the McGovern campaign from which a list of names would be compiled that Dean would in turn submit to Walters for IRS audits. (Dean testimony, 2 HJC. 229.)

On September 13, 1972, Walters showed Shultz the list and advised him that he believed they should not comply with Dean's request to commence examination or investigation of the people named on the list. Shultz told Walters to do nothing with respect to the list and Walters put it in his office safe. (Book VIII, 275–79.)

On September 15, 1972, during a conversation with the President, Haldeman mentioned, among other things, "Dean working through the IRS." The transcript prepared by the inquiry staff reflects the following exchange:

PRESIDENT. [Unintelligible]

HALDEMAN. John, he is one of the quiet guys that gets a lot done. That was a good move, too, bringing Dean in. But it's—

PRESIDENT. Yeah.

HALDEMAN. It—He'll never, he'll never gain any ground for us. He's just not that kind a guy. But, he's the kind that enables other people to gain ground while he's making sure that you don't fall through the holes.

PRESIDENT. Oh. You mean——

HALDEMAN. Between times, he's doing, he's moving ruthlessly on the investigation of McGovern people, Kennedy stuff, and all that too. I just don't know how much progress he's making, 'cause I——

PRESIDENT. The problem is that's kind of hard to find.

HALDEMAN. Chuck, Chuck has gone through, you know, has worked on the list, and Dean's working the, the thing through IRS and, uh, in some cases, I think, some other [unintelligible] things. He's—He turned out to be tougher than I thought he would, which is what

PRESIDENT. Yeah. (HJCT 1)

Soon thereafter Dean entered the room. Dean has testified that in the last 17 minutes of that meeting, he, the President, and Haldeman discussed the use of the IRS.[1] (Dean testimony, 2 HJC 229.) As Dean recalled the conversation, they talked about the problem of having the IRS conduct audits; Dean told the President and Haldeman of his difficulty in getting Walters to commence audits; and the President complained that Shultz had not been sufficiently responsive to White House requirements. (Dean testimony, 2 HJC 229.) book VIII, 334–36.)

On or about September 25, 1972, Dean telephoned Walters and inquired as to the progress regarding the list of McGovern campaign workers and contributors. Walters informed Dean that no progress

[1] On May 28, 1974, the Watergate Special Prosecutor moved that the recording of the last portion of this meeting be turned over to the appropriate grand jury because that recording was relevant to the alleged White House attempts to abuse and politicize the IRS, including unlawfully attempting in August and September 1972 to instigate an IRS investigation of O'Brien. On July 12, 1974, Judge Sirica granted the motion and ordered that the recording of the conversation from 6 p.m. to approximately 6.16 p.m. be made available to the Special Prosecutor. The order was stayed pending appeal by the President. (Book VIII, 340–49.) On June 24, 1972, the committee subpenaed tapes, dictabelts, memoranda, and other records of the conversations. Such materials have not yet been furnished to the committee.

had been made. Dean asked if it might be possible to develop information on 50, 60, or 70 of the names, and Walters responded that, although he would reconsider the matter with Secretary Shultz, any activity of this type would be inviting disaster. On September 29, Walters discussed Dean's request with Shultz and they agreed that nothing be done with respect to the list. Thereafter, there were no further discussions by Walters about this matter during his tenure as IRS Commissioner and no actions were taken by the IRS in regard to the list. (Book VIII, 274–79.)

On July 11, 1973, Walters turned the list over to the Joint Committee on Internal Revenue Taxation. On December 20, 1973, the staff of the joint committee issued a report stating that it found no evidence that the returns of any persons on the list were screened as a result of White House pressure. (Book VIII, 280–85.)

*3. Investigation of Lawrence O'Brien*

During the summer of 1972, Commissioner Walters was asked by Secretary Shultz to check on a report by Ehrlichman that Democratic National Committee Chairman Lawrence O'Brien had received large amounts of income which might not have been reported properly. Ehrlichman had received a sensitive case report on the O'Brien investigation sometime earlier and had asked Roger Barth, assistant to the IRS Commissioner, to check O'Brien's tax returns. Barth did so and reported to Ehrlichman that the returns seemed in order. (Book VIII, 233–25; Barth testimony, June 5, 1974.) Walters reported to Shultz on the IRS's examination of O'Brien's returns for 1970 and 1971, and later learned from Shultz that Ehrlichman was not satisfied with the report on the status of O'Brien's returns. Because of Ehrlichman's inquiries, O'Brien was interviewed during the summer of 1972, although it was generally the IRS's policy to postpone investigations involving sensitive cases, to the extent possible without loss of position or revenue, until after the election. A copy of the taxpayer conference report was submitted to Shultz. (Book VIII, 217–25)

A short time thereafter Shultz informed Walters that Ehrlichman was not satisfied and that he desired further information about the matter. Ehrlichman has testified that he called Shultz to complain that the IRS was delaying the audit until after the election. Ehrlichman told Shultz of his concern that the IRS bureaucracy, in its timing of audits, might be moving more quickly on Republicans than Democrats. (Book VIII, 224–25) Walters advised Shultz that IRS had checked the filing of the return and the examination status of those returns, which were closed, and that there was nothing else the IRS could do. (Book VIII, 217–27)

On or about August 29, 1972, at the request of Shultz, Walters went to Shultz's office with Barth to conclude the review of the O'Brien matter. The three discussed the matter and agreed that the IRS could do no more, and thereafter they jointly telephoned Ehrlichman. Shultz and Walters informed Ehrlichman that the IRS had verified that O'Brien had filed returns which reflected large amounts of income, that the IRS had already examined and closed their returns, and that the three were all agreed that there was nothing further that the IRS could do. Ehrlichman indicated disappointment and said to Walters that he

was "goddamn tired of his foot-dragging tactics." (Book VIII, 227–35)

Haldeman and Dean have testified that during their September 15, 1972 meeting with the President there was a discussion of taking steps to overcome the unwillingness of the IRS to follow up on complaints.[2] (Book VIII, 333–36) According to an affidavit by SSC Minority Counsel Fred Thompson, J. Fred Buzhardt, Special Counsel to the President, has stated that during the September 15, 1972 meeting Dean reported on the IRS investigation of Lawrence O'Brien. (Book VIII, 337–39)

*4. Other Tax Information*

The summary of information briefly adverts to a number of instances in which a member of Dean's staff obtained confidential information and attempted to have audits performed on certain individuals. There is no competent evidence of Presidential knowledge of, or involvement in, any of these cases,[3] although there is an apparent reference to securing information from the IRS in the transcript of the conversation between John Dean and the President on March 13, 1973:

> PRESIDENT. Do you need any IRS [unintelligible] stuff?
> DEAN. Uh—Not at the——
> * * * * * * *
> DEAN. * * * Uh, there is no need at this hour for anything from IRS, and we have a couple of sources over there that I can go to. I don't have to fool around with Johnnie Walters or anybody, we can get right in and get what we need. (HJCT 50)

*B. Discussion*

Many of the alleged instances of IRS abuse, for example, the *Gerald Wallace* case, are very weak in terms of Presidential knowledge.[4] With respect to the O'Brien investigation, the evidence in hand does not show that the President urged or ordered Ehrlichman to obtain tax information on O'Brien, or to encourage an audit of his taxes. There is a suggestion of Presidential knowledge of those activities, however, in the affidavit of Fred Thompson, Minority Counsel to the SSC, in which Thompson states that J. Fred Buzhardt had informed him that the September 15, 1972 conversation between the President and Dean concerned a report by Dean on the tax investigation of O'Brien.[5]

The enemies list is a stronger case for Presidential knowledge. The tape in the possession of the committee shows that Haldeman informed the President that Dean was moving "ruthlessly" on the investigation of McGovern people, and working the "thing" through the IRS. Dean's testimony indicates that the President urged him to use the IRS to conduct audits, and that Dean thereafter contacted Johnnie Walters a second time to ask if there had been any action on the list of McGovern staff and contributors that he had given Walters several days earlier.

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[2] Both this committee and the Special Prosecutor have attempted to obtain a tape of the last 17 minutes of this conversation. See 1, supra.

[3] Dean's executive session testimony before the Senate Select Committee (book VIII, p. 154) suggests that the President wanted the IRS "turned off on friends of his." A subsequent staff interview with Dean has indicated that Dean learned of this not from the President, but from Higby.

[4] A potentially applicable criminal statute is 26 U.S.C. § 7213 which prohibits the unauthorized disclosure of tax information by any officer or employee of the United States.

[5] A criminal statute which might apply to this situation is 26 U.S.C. § 7212, entitled "Attempts to interfere with administration of internal revenue laws." However, this statute is usually applied to persons who attempt to prevent the execution of the Revenue Code.

Even if the President did not instruct Dean to go back to Walters, if he had knowledge of any attempt to use the IRS for political purposes, acquiescence would appear indefensible. If it is believed that the President knew of or encouraged Dean's activities with respect to the IRS, perhaps the best that can be said is that a minute examination of 5 years of any President's tenure, involving hundreds of thousands of governmental decisions, would probably reveal a certain irreducible minimum number of judgmental errors. Without in any way attempting to justify or excuse an isolated or limited example of misuse of a Government agency, it may yet be suggested that one or two, or even three or four such examples in the course of 5 years, do not establish a "pattern" of gross abuse of power sufficient to warrant the removal of a President. In the heat of politics, as in all emotionally intense human endeavors, it may be that men make errors of the heart as well as of the head; perhaps the fact that the context here is political should not preclude the possibility that condemnation might be tempered by understanding, if not forgiveness.

## Kleindienst Confirmation Hearings

### *A. Facts* [1]

On February 15, 1972, the President nominated Deputy Attorney General Richard G. Kleindienst to be Attorney General of the United States to succeed John N. Mitchell, who was leaving the Department of Justice to campaign for the reelection of the President. The Senate Committee on the Judiciary held brief hearings on the nomination and quickly voted to recommend that the nomination be confirmed. Book V, 605.)

On February 29, 1972, Jack Anderson, a newspaper columnist, published the first of three articles alleging that three antitrust cases, commenced by the Department of Justice in 1969, had been settled favorably to the defendant, the International Telephone & Telegraph Corporation (ITT), in 1971 in return for a large financial contribution to the 1972 Republican National Convention in San Diego. Kleindienst immediately asked that the Senate Judiciary hearings be reconvened in order that he might answer these allegations. (Book V, 633.)

On March 2, 1972, pursuant to Kleindienst's request, the hearings reconvened. The purpose of the hearings was to determine what connection, if any, existed between the settlement of the ITT antitrust cases and the ITT convention contributions. In connection with the investigation, the Senate Committee on the Judiciary inquired into several areas including: (1) the extent of involvement of the White House in the filing, handling, and settling of the ITT antitrust cases; (2) the circumstances under which the ITT convention pledge was obtained; and (3) the actions of the Department of Justice personnel in the ITT antitrust cases. Several of the witnesses before the committee were questions specifically in regard to those areas. (Book V, 677–904, passim.)

Richard Kleindienst testified that he had never been interfered with by anyone at the White House in the exercise of his responsibilities in the ITT antitrust cases, (Book V, 677–80, 729–34, 755–58, 849–53.) That testimony was untrue, in that on April 19, 1971, the day before an appeal was due to be filed in the Supreme Court in the *ITT-Grinnell* case, the President telephoned Kleindienst and ordered that the appeal not be filed. (Book V, 311.) Further, in his Senate testimony, Kleindienst described the circumstances of the decision to delay this appeal without mentioning the President's phone call. (Book V, 729–34, 751–54.)

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[1] The committee's investigation of the ITT case was originally focused on allegations that the administration and the President had settled the three ITT antitrust cases in exchange for an ITT pledge of financial support for the 1972 Republican National Convention. However, during the course of the Staff's investigation the focus shifted to Presidential involvement in the 1972 Kleindienst Confirmation Hearings. The Special Prosecutor has also concluded that no impropriety existed during the 1971 period, but is investigating possible offenses in connection with the 1972 hearings. Thus there will be no discussion herein of the 1971 events except as they specifically relate to the testimony of the witnesses during the 1972 hearings.

On May 16, 1974 Kleindienst pleaded guilty to an information charging a failure to answer accurately and fully questions pertinent to the Senate Judiciary Committee's inquiry, in violation of 2 U.S.C. 192. (Book V, 965.)

John N. Mitchell testified in part as to his involvement in the handling of the ITT antitrust cases. Mitchell testified that he had recused himself in the ITT cases. (Book V, 771.) In fact, Mitchell had been involved in contacts with ITT officials concerning the cases during 1970 and had various discussions with White House staff members about the ITT antitrust cases. (Book V, 143.) In his Senate testimony, Mitchell denied that he had ever discussed the ITT antitrust cases with the President, although he had specifically discussed the *ITT-Grinnell* appeal with the President on April 21, 1971, 2 days after the President's order to Kleindienst. (Book V, 371–76; 771–75.) In that discussion Mitchell had persuaded the President not to interfere with the appeal of *ITT–Grinnell* to the Supreme Court. (Book V, 371.)

*1. Evidence Relating to Presidential Involvement*

Whatever evidence of Presidential involvement in and knowledge of the events of the Senate Judiciary Committee hearings in March and April, 1972 may exist is entirely circumstantial.

The President returned from China on the evening of February 28, 1972. After spending a few days in Key Biscayne the President began his first full day in the White House on Monday, March 6. (Book V, 141–42.) Four days earlier, on the evening of March 2, several politically embarrassing documents had been delivered by an ITT representative to a White House aide, Wallace Johnson, who in turn gave them to John Mitchell and Charles Colson. (Book V, pt. 2, 681.) Three days earlier, on March 3, Richard Kleindienst had testified about the circumstances surrounding the delay of the appeal of the *ITT–Grinnell* case a year earlier. (Book V, 729–34.)

On Monday, March 6, the President met, and talked by telephone, with three of his top aides, Haldeman, Ehrlichman, and Colson.[2] After a noon-hour meeting with the President, John Ehrlichman met with SEC Chairman Casey, apparently in an attempt to shortcut an SEC subpoena of the politically sensitive documents that had been delivered by ITT to the White House on March 2. (Book V, 735.) Also on March 6, Richard Kleindienst's diary reflects the fact that he was at the White House for a Cabinet meeting with the President. (Richard Kleindienst diary, submitted to the inquiry staff after the initial presentation to the committee of information regarding the ITT matter.) The next day Kleindienst in a detailed statement to the Senate committee described the events of April 19, 1971 without mentioning the President's order to him not to file the *ITT-Grinnell* appeal. (Book V, 751.)

On March 14, 1972, John Mitchell appeared before the Senate Judiciary Committee and twice testified that there had been no communications between the President and him with respect to the ITT antitrust litigation or any other antitrust litigation.[3] That evening the

[2] On June 24, 1974 the committee issued a subpoena to the President for tapes, dictabelts, memoranda and other records of these meetings and conversations. Such materials, if they exist, were not furnished to the committee.

[3] On June 24, 1972, the committee issued a subpoena to the President for tapes, dictabelts, memoranda, and other records of that meeting. Such materials, if they exist, were not furnished to the committee.

President and Mr. Mitchell had their only telephone conversation during March of which the committee staff is aware. (Book V, 771.) Mr. Mitchell has denied in an unsworn interview with the inquiry staff that he discussed his testimony, or the testimony of any other witness before the Senate committee with the President, with Mr. Kleindienst, or with any members of the President's staff.

According to Charles Colson's calendar, he spent the morning of March 18, 1972 on "ITT" matters. He had three telephone conversations with Mr. Mitchell during the morning. In his interview with the staff Mr. Mitchell did not recall any conversations with Colson. That afternoon the President and Colson met for over 2 hours.[4]

On March 24, 1972, the President held his only press conference of this period. He said that:

> . . . as far as the [Senate Judiciary Committee] hearings are concerned, there is nothing that has happened in the hearings to date that has in one way shaken my confidence in Mr. Kleindienst as an able, honest man, fully qualified to be Attorney General of the United States.

In this press conference, the President also said that, "We moved on [ITT]. We moved on it effectively * * * Mr. McLaren is justifiably very proud of that record * * * [and he] should be." He said that administration action had prevented ITT from growing further and quoted Solicitor General Griswold as to the excellence of the ITT settlement. (Book V, 799.)

Charles Colson testified before the committee as to a meeting during this time period that he attended with the President and Haldeman. Colson testified that the President recalled that he had made a telephone call to Kleindienst:

> Mr. COLSON. I recall one instance when the President was basically talking to Haldeman, but I was in the room and obviously the question of his involvement in the ITT Settlement had somehow come up.
>
> Mr. JENNER. When you say his you are referring to who?
>
> Mr. COLSON. The President.
>
> Mr. JENNER. All right.
>
> Mr. COLSON. Because he said do you, he said to Haldeman, he said do you remember the time I called Kleindienst and got very agitated or very excited with Dick and did I discuss the ITT case or was I talking about policy. And Bob said no you were talking about policy, you weren't discussing the case.
>
> And the President said are you sure?
>
> And Haldeman said yes, either I was there while you called or Ehrlichman was there and heard your call and the President said, thank God I didn't discuss the case.
>
> Mr. JENNER. Do you have a recollection with better certainty that this conversation you have now described took place during the span of the ITT–Kleindienst hearings.
>
> Mr. COLSON. Yes, I think it did. I can't imagine why it would come up at another time. I think it must have—I know it is the first time I ever knew the President talked to Kleindienst about this matter at all. And I don't think I learned about it until late in the month and I remember learning about it in that fashion, that the President was trying to recall what he had said to Kleindienst. (Charles Colson testimony, 3 HJC 383.)

Colson also testified that on March 27 and 28, 1972, he and Clark MacGregor met with the President and presented to him the reasons why they felt the nomination of Kleindienst should be withdrawn.[5]

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[4] On June 24, 1972 the committee issued a subpoena to the President for tapes, dictabelts, memoranda, and other records o fthat meeting. Such materials, if the exist, were not furnised to the committee.

[5] Tapes of that meeting were neither requested nor subpenaed by the committee, because the staff was unaware of their relevance until Colson's testimony was received.

Colson testified that he left that meeting feeling that the President was inclined to agree that the nomination should be withdrawn. (Colson testimony 3 HJC.)

On March 29, Colson and MacGregor met with H. R. Haldeman who informed them that the President was going to meet with Kleindienst that afternoon to determine whether or not Kleindienst would withdraw his name from consideration. (Colson testimony, 3 HJC 385.) Colson also testified that on the morning of March 30, he and MacGregor met with Haldeman who described the President's meeting with Kleindienst in which Kleindienst convinced the President that the nomination should not be withdrawn. (Colson testimony, 3 HJC 386.) However, in an unsworn interview with the staff, Kleindienst stated that he had no contact with anyone at the White House during March, April, and May of 1972.

Colson took notes of his meeting with Haldeman and MacGregor (exhibit 22 to Charles Colson testimony, 3 HJC 387–91) and later returned to his office to dictate a memorandum to Haldeman that argued that the nomination should be withdrawn. (Colson testimony, 3 HJC 393–96.) His reasons included the fact that he had reviewed documents that would tend to contradict Mitchell's testimony to the Senate Committee. (Book V, 805–09.) Later that day Colson met with the President and informed him that he had written such a memorandum.[6] After meeting with the President, Colson sent the memorandum to H. R. Haldeman. Colson testified that by normal practice the memorandum would be given by Mr. Haldeman to the President. (Colson testimony, 3 HJC 397.)

Mr. Mitchell has told the inquiry staff that, near the end of March, he recalls generally that he conveyed to the President, either directly, or through Mr. Haldeman, his view that the Kleindienst nomination should not be withdrawn but that he recalls no specific conversations.

On April 4, 1972, the President met four times with Haldeman and talked once by telephone with Colson. During the afternoon the President met with Haldeman and Mitchell and discussed, among other things, changing the convention site from San Diego to Miami.[7] An edited transcript of this conversation has been supplied to the committee. This edited transcript indicates no evidence of Presidential knowledge of the testimony of Kleindienst or Mitchell, and indeed shows that there was very little discussion of the hearings.

On June 8, 1972, Kleindienst was confirmed by the Senate. On June 12, 1972, Kleindienst was appointed to the Office of the Attorney General, and was sworn in at a ceremony at the White House attended by the President. (Book V, 901.)

During the period that the Kleindienst nomination was pending before the Senate, the press provided extensive coverage of the hearings, the debates and the final vote. (Book V, 855.) This press cover-

[6] On June 24, 1974, the committee issued a subpena to the President for tapes, dictabelts, memoranda, and other records of meetings and conversations on March 30, 1972, between the President and Haldeman, Ehrlichman, Colson or any of them. Such materials, if they exist were not furnished to the committee.

[7] On June 24, 1974, the committee issued a subpoena to the President for tapes, dictabelts, memoranda, and other records of all but the last meeting. Such materials, if they exist, have not yet been furnished to the committee. On May 15, 1974, the committee subpenaed the tape and other materials relating to the April 4 meeting between the President, Haldeman, and Mitchell.

[8] The President invited the chairman and ranking member to verify that this transcript accurately reflects the discussion. This invitation was not accepted.

age was reflected in the news summaries prepared daily by the White House staff for the President.[9]

On January 8, 1974, the Office of the White House Press Secretary issued a "White Paper" entitled, "The ITT Antitrust Decision", describing the President's role in the ITT antitrust cases and their settlement. The White Paper denied that the President had any involvement in the ITT settlement and denied that the settlement was made in exchange for an ITT convention pledge, but admitted the telephone call to Kleindienst. (Book V, 956.)

### *B. Theories of the Evidence*

*1. Summary of information: Constitutional theory*

The summary of information argues that a President has a duty to transmit information to the Senate about his nominee's testimony given to a Senate committee considering the nominee's qualification to hold office. This duly rests on the Senate's power to advise and consent to the nomination. The theory behind this duty is that the constitutional safeguard of Senate confirmation could be frustrated if the President permitted the Senate to act on the basis of any information which is untrue, even in part. As this case is included under the general category of abuse of power, the summary of information also argues that a President abuses his power by appointing the nominee after his confirmation has been tainted.

*2. Applicable criminal law*

Title 18 U.S.C. §4, entitled "Misprision of Felony," provides:

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than $500 or imprisoned not more than three years, or both.

*3. Questions of fact*

Whatever view of the evidence is taken, certain preliminary questions of fact must be answered before wrongful conduct on the part of the President may be established.

(*a*) *Was the testimony of Kleindienst and Mitchell perjury?*—In the course of their testimony before the Senate Committee on the Judiciary, Kleindienst and Mitchell appear to have given incorrect or misleading testimony several times. Kleindienst apparently misled the committee about the nature of his contacts with the White House in the filing, handling, and settlement of the ITT antitrust cases. Mitchell apparently misled the committee about his contact with the White House and with ITT officials regarding the ITT cases, and he further was evasive about his involvement in the administration's decision to select San Diego as the site of the 1972 Republican National Convention. Certain statements by Kleindienst and Mitchell appear to be

[9] On June 24, 1974, the committee issued a subpena for the President's copies of the [10] On June 24, 1974, the committee issued a subpena for the President's copies of the news summaries compiled during the period February 22, 1972, through June 2, 1972, inclusive. On July 12, 1974, the President's Special Counsel responded by letter to the subpena and in part agreed to furnish the committee copies of summaries which were actually presented to the President. Mr. St. Clair informed the committee that the news summaries show no notation by the President on those portions dealing with the ITT/Kleindienst Hearings, and offered to allow the chairman and ranking minority member to examine the summaries to verify that fact. That invitation was not accepted.

clearly incorrect. On March 7, 1972, Kleindienst described the reasons for the decision to delay the *ITT-Grinnell* appeal on April 19, 1971, without mentioning the President's telephone call of that day in which the President ordered the appeal to be dropped. On March 14, 1972, Mitchell stated that he never discussed the ITT antitrust cases with the President, whereas actually he had discussed the appeal with the President on April 21, 1971.[10]

A factual issue may be raised as to the intent of Kleindienst and Mitchell in these misstatements. In his interview with the inquiry staff for example, Mr. Mitchell indicated that what he meant when he denied talking to the President about the ITT cases, was that he had never talked to the President about the merits of those cases.

The question to which Mr. Kleindienst directed his attention and misstatements, by way of contrast, was specifically why the *ITT–Grinnell* appeal to the Supreme Court in April 1971 was delayed. However, the misstatements of Kleindienst may be subject to the defense of literal truth. The lengthy statement which Kleindienst read to the committee on March 7, 1972, omitting any mention of the President's telephone call, may be misleading but not in fact false. Kleindienst's statement related only actual events of April 19 minus the telephone call, and therefore it may be literally true but incomplete. Under the recent decision in *Branston* v. *United States*, 409 U.S. 352 (1973), in which the Court held that testimony that is literally true but arguably misleading by negative implication is not perjury, it could be argued that Kleindienst's remarks on March 7 did not constitute perjury.

It is also possible that the misstatements were not perjury because they were not material. The test of materially is simply whether the testimony has a natural effect or tendency to influence, impede or dissuade the investigative body from pursuing its investigation, *United States* v. *Morgan*, 194 F. 2d 623 (2d Cir. 1952), *cert. denied*, 343 U.S. 965 (1952). The Senate Committee on the Judiciary was charged with evaluating the qualifications of Richard Kleindienst to be Attorney General. In the exercise of this constitutional responsibility the Senate committee was investigating the connection between the ITT antitrust cases and the ITT convention pledge. The fact that the President had intervened in the handling of the ITT cases might have been of substantial interest to the committee, if only because it specifically involved the nominee before the committee and his predecessor in office.

On the other hand, it may be argued that the Senate committee's investigation into the ITT scandal was focused properly only on the settlement of the ITT cases and the reasons for the settlement, so that a misstatement about the appeal would not be material to the committee's inquiry. It may be questioned, furthermore, whether disclosure of the President's telephone call to Kleindienst, and the latter's successful resistance, would have had any adverse impact upon the committee's judgment as to Mr. Kleindienst's qualifications.

(*b*) *Did the President have knowledge of the testimony of Kleindienst and Mitchell?*—The evidence of Presidential knowledge comes first from the fact that the testimony of the witnesses before the hearings was extensively reported in the press and broadcast media. Sec-

[10] To date, neither Kleindienst nor Mitchell has been prosecuted for perjury in connection with the ITT hearings. Kleindienst has pleaded to the lesser offense of failure to fully respond under 2 U.S.C. § 192. Mitchell has not been prosecuted for any act relating to the ITT/Kleindienst hearings.

ond, the President had a telephone conversation with Mitchell on the evening of March 14, the day of Mitchell's allegedly perjured testimony. Third, the President indicated in his March 24 press conference that he was familiar with the hearings and the testimony of the witnesses. Fourth, Colson has testified that Haldeman informed him on March 29 and 30 that the President intended to, and did in fact, meet with Kleindienst on the afternoon of March 29. It could be inferred from this meeting that the President learned of and discussed Kleindienst's misleading testimony. Fifth, Charles Colson's March 30 memorandum to Haldeman cites certain documents in White House files that contradicted Mitchell's testimony and tended to show that the President was involved in the ITT case in 1971. If the President read this memorandum, he might have realized that evidence existed that contradicted the testimony of Mitchell before the committee.

First, no direct evidence of actual Presidential knowledge exists. Except for the President's general statement in his press conference of March 24, the evidence is entirely inferential. Second, Kleindienst's testimony concerning the appeal was not generally reported in the press. The focus of the news media was on the allegations concerning the settlement of the ITT cases, not the appeal of the *ITT-Grinnell* case. It is, therefore, unlikely that the President learned of Kleindienst's perjury by way of the media. Third, the press conference of March 24 does not indicate specific knowledge of the actual testimony of either Kleindienst or Mitchell. Charles Colson and other witnesses have informed the staff that the President does not prepare for news briefings by studying primary news sources. Instead he utilizes a briefing book prepared by his staff. There is no evidence before the committee as to what the briefing book for the President's March 24 press conference contained. Nor has the committee requested this briefing book. Fourth, although H. R. Haldeman may have told Charles Colson that Kleindienst and the President met on the afternoon of March 29, Kleindienst has specifically denied this to the staff. Kleindienst also said that he had had no conversations with anyone at the White House during March, April, and May of 1972. Fifth, although Colson's memo of March 30 does indicate that documents contradicted Mitchell's testimony, Charles Colson testified that he does not know whether the President received or read the memo. In addition, Colson has testified to the committee that he never discussed either his memo, the documents described therein, or the testimony of Mitchell or Kleindienst with the President. Nor did the President ever indicate to Colson any awareness that Kleindienst had not told the truth to the Senate committee. (Colson testimony, 3 HJC 401.)

(*c*) *Did the President know or believe that the testimony of Kleindienst and Mitchell was false?*—The issue of whether the President would have known the testimony of Kleindienst and Mitchell was false depends on whether the President would have correctly recollected his contact with the two about the ITT-Grinnell appeal in April 1971, 10½ months earlier.

The President was in fact a participant in the events of April 19 and 21, 1971. The summary of information submitted to the committee suggests that the strident tone of the telephone call to Kleindienst, and the fact that the President's conversation on April 21, 1971, caused him to rescind his order to drop the ITT-Grinnell appeal, make

it seem likely that the President had such knowledge (summary of information 144. In addition, Charles Colson has testified that he was present at a meeting in which the President recalled that he had made a phone call to Kleindienst and "blew up at him."

The Kleindienst call lasted no more than 3 minutes; the Mitchell discussion less than 5. The conclusion is hardly compelled that the President, in 1972, after the passage of 10½ months filled with events of the order of importance of his trip to China, would advert to and recall the conversations.

Moreover, the evidence supports the conclusion that in fact the President inaccurately recalled the substance of that telephone call. Colson testified that the President was assured by Haldeman that the call was not about the ITT case but rather was about the antitrust policies of McLaren. According to Colson, the President responded, "* * * thank God, I didn't discuss the case."

*4. Constitutional Theory: Interference With Power of Advice and Consent; Abuse of Power of Appointment*

The summary of information contends that in connection with nominations the President has a duty to come forward and correct the record. As authority for this proposition, the arguments of James Iredell relating to the treatymaking process, made in the North Carolina Ratifying Convention, are cited:

> [The President] must certainly be punishable for giving false information to the Senate. He is to regulate all intercourse with foreign powers, and it is his duty to impart to the Senate every material intelligence he receives. If it should appear that he has not given them full information, but has concealed important intelligence which he ought to have communicated, and by that means induced them to enter into measures injurious to their country, and which they would not have consented to had the true state of things been disclosed to them, in this case, I ask whether upon an impeachment for a misdemeanor upon such an account, the Senate would probably favor him.[11]

However, Iredell's remarks were directed to the treatymaking process, where the Senate has a larger role than it does in the appointment process. In advising and consenting to treaties, the Senate has a role nearly coextensive with that of the President. The intent of the Framers was that the President would meet with the Senate and consult on treaty projects.[12] Consequently, the Senate has conferred with the President throughout all stages of the treaty process—from preliminary negotiations with foreign powers through supplementary negotiations caused by reason of Senate amendments to treaties submitted for ratification.[13]

With respect to confirmation of nominees for office, by way of contrast, substantive consultation between the Senate and the President has been the exception rather than the rule:

> In the early history of the country several committees of the Senate sought to confer with the President concerning his nominations. Both John Adams and James Madison sent a message to the Senate maintaining that it was con-

[11] Elliot 127.

[12] Pierce Butler, a member of the Constitutional Convention, is quoted as follows: "Treaties to be gone over clause by clause, by the President and Senate together * * *" cited in John Adams' writings (ed. C. F. Adams, 1851), III, p. 409. See Haynes, George F., "The Senate of the United States—Its History and Practice," (Houghton Mifflin Co., Boston, 1938).

[13] Eleven, different Presidents from Washington to Harding have formally requested the Senate's advice before entering upon proposed negotiations. Moreover, after submission, the President and the Senate have negotiated amendments to treaties which were subsequently ratified by foreign governments. Haynes, "The Senate of the United States," supra, pp. 590, 608.

trary to the Constitution. Thereafter no further attempt was made by a Senate committee to confer formally with the President about a nomination, though informal consultations between the President and members of Congress are common and it has never been contended that they are in any way improper.

Requests for information about nominees are usually made to the departments concerned, and ordinarily such information is supplied. Presidents, however, have consistently asserted the right to withhold confidential information.[14]

*5. Abuse of Power: Need for a Standard*

Whether or not a President is legally capable of committing a misprision within the meaning of 18 U.S.C. § 4,[15] it is submitted that he must have known of and concealed perjury in order to be liable in impeachment under the facts of the Kleindienst confirmation case.

The bureaucratic considerations in favor of delineating the bounds of "abuse of power" in the Kleindienst context by reference to the elements of criminal misprision are, arguably, roughly analogous to those which gave rise to the longstanding Federal policy in this area; namely, the avoidance of reporting burdens.

The significant practical ramifications of holding any President accountable for his failure to correct the record when testimony or other information supplied to Congress by executive branch officers is not perjurious, but only misleading, should be obvious. No formulation of the "abuse of power" charge as general as that set out in the summary of information should be adopted by the committee without reflecting upon these ramifications.

*6. Criminal Law: Misprision of Felony*

The statutory offense of misprision of felony has four elements:

> To sustain a conviction . . . for misprision of felony it [is] incumbent upon the government to prove beyond a reasonable doubt
> (1) That . . . the principal had committed and completed the felony alleged prior to [the date of the alleged misprision];
> (2) That the defendant had full knowledge of that fact;
> (3) That he failed to notify the authorities; and
> (4) That he took [an] affirmative step to conceal the crime of the principal.[16]

(a) "*Affirmative act*" *requirement.*—The basic reason for the affirmative act requirement seems to be that to punish mere nondisclosure would impose an undue burden on the citizen:

> To suppose that Congress reached every failure to disclose a known federal crime, in this day of myriad federal tax statutes and regulatory laws, would impose a vast and unmeasurable obligation. It would do violence to the unspoken principle of the criminal law that "as far as possible privacy should be respected." *United States* v. *Worcester*, 190 F. Supp. 548, 565–67, (D. Mass. 1960) (*dictum*) (Wyzanski, J.).

In *State* v. *Michaud*, 114 A. 2d 352, 355 (Me., 1955) the court similarly suggested that the requirement of an affirmative act was necessary to prevent overbroad application of the statute:

> The act of concealment must be alleged. Otherwise, a person could be tried and erroneously convicted on slight evidence that was only to the effect that he was in the vicinity of where a felony was "actually" committed, and from that improperly argue [sic] that he must have "known," and that he concealed because he knew and did "not disclose." He might not have seen. He might not have known or understood all the facts.

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[14] Harris, "The Advice and Consent of the Senate" (University of California Press, 1953), pp. 240–41.

[15] See discussion, subsection (c), infra.

[16] *Neal* v. *United States*, 102 F. 2d 643, 646 (6th Cir. 1939); *Lancey* v. *United States*, 356 F. 2d 407, 409 (9th Cir. 1966), certaria denied, 386 U.S. 922; *United States* v. *King*, 402 F. 2d 694, 695 (9th Cir. 1968).

A dictum of Chief Justice Marshall also reflects the reluctance of the judiciary to construe misprision statutes so as to punish bare nondisclosure of information:

> It may be the duty of a citizen to accuse every offender, and to proclaim every offense which comes to his knowledge; but the law which would punish him in every case, for not performing this duty, is too harsh for man. *Marbury* v. *Brooks*, 7 Wheat. 556, 575–76 (1822).

(b) *Degree of knowledge required.*—Several Federal cases state that in order to support a conviction for misprision, it is necessary to prove that the defendant had "full knowledge" of the commission of the crime by the principal. *Neal* v. *United States*, 102 F. 2d 643, 646 (8th Cir. 1939); *Lancey* v. *United States*, 356 F. 2d 407, 409 (9th Cir. 1966), *cert. denied* 385 U.S. 922; *United States* v. *King*, 402 F. 2d 694, 695 (9th Cir. 1968). In *Commonwealth* v. *Lopes*, 318 Mass. 453, 458–59 (1945), the court intimated that mere "suspicion" that a felony had been committed could not render the defendant's silence criminal.

(c) *Duty of a President of the United States under the misprision statute.*—The Federal misprision statute requires that felonies be reported to "some judge or other person in civil or military authority under the United States." The President of the United States is the chief officer of the executive branch of the Federal Government. U.S. Constitution, article II, section 1, clause 1. He is the Commander in Chief of the Army and Navy of the United States, U.S. Constitution, article II, section 2, clause 1. In view of the plain language of the statute, it is difficult to resist the conclusion that the President is a "person in civil or military authority under the United States," within the meaning of the statute.[17]

It is difficult to contend that all persons in civil or military authority under the United States are, simply by virtue of their positions, incapable of committing the offense of misprision of felony. Law enforcement officers have been prosecuted under 18 U.S.C. § 4—although admittedly they were State, rather than Federal, officials. *Bratton* v. *United States*, 73 F. 2d 795 (10th Cir. 1934); *United States* v. *Daddano*, 432 F. 2d 1119, 1122 (7th Cir. 1970), *cert. dismissed* 401 U.S. 967, *cert. denied* 402 U.S. 905.

In a case in which it is claimed that a U.S. official has discharged his duty under 18 U.S.C. § 4 by making a decision not to prosecute a person known to have committed a felony, the appropriate inquiry would seem to be whether his decision not to prosecute constituted the exercise of a function assigned to him by the Constitution or laws of the United States.

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[17] In England, the offense of misprision could be avoided by making a report to the King. Concerning the punishment for concealment of felonies, Coke wrote:

"From which punishment if any will save himself he must follow the advice of Bracton, to discover it to the King, or to some judge or magistrate that for the administration of justice supplieth his place, with all speed that he can."

3 Inst. Cop. 65.

## Government Expenditures at San Clemente and Key Biscayne

### *A. Facts*

The report submitted to the committee by the inquiry staff on July 19, 1974, contains a detailed chronology of facts regarding the initiation of, installation of and payment for 15 cagetories of Government expenditures totaling over $92,000 [1] at President Nixon's private properties at San Clemente and Key Biscayne in the years 1969 through 1972. The Joint Committee on Internal Revenue Taxation found that these expenditures constituted taxable income to the President. These expenditures were brought into question on one or more of the following grounds:

(1) Although an expenditure was requested by the Secret Service, either (a) substantial increases in cost were incurred because of the personal aesthetic desires of the President or his representatives, or (b) the item primarily benefited the President and only secondarily served a security function.

(2) An expenditure which primarily benefited the President was requested by the President or his representatives rather than by the Secret Service.

(3) Although an expenditure had a security justification, the expenditure was one that any homeowner would likely and routinely make at his own expense.

Various expenditures on the President's private properties were also questioned in the course of hearings before the Subcommittee on Treasury, Postal Service, and General Government Appropriations of the House Appropriations Committee in June 1973; in hearings be-

[1] See table below.

| | |
|---|---|
| San Clemente: | |
| Fireplace exhaust fan | $388.78 |
| Heating system | 12,988.00 |
| Sewer system | 3,800.00 |
| Landscape construction* and maintenance | 27,018.00 |
| Den windows | 1,600.00 |
| Boundary and structural surveys | 5,472.59 |
| Paving | 5,866.66 |
| Point gazebo | 4,981.60 |
| Handrails | 988.50 |
| Beach cabana and railroad crossing | 3,500.00 |
| | 66,614.03 |
| Key Biscayne: | |
| Landscape construction* | 3,414.00 |
| Landscape maintenance | 7,991.00 |
| Fence and hedge screen* | 12,679.00 |
| Shuffleboard | 1,600.00 |
| | 25,684.00 |

*The Internal Revenue Service found $58,954.77 of Government expenditures at San Clemente and $8,433.76 of Government expenditures at Key Biscayne to have constituted taxable income to the President for the same period. The items marked with an asterisk (*) were found by the Joint Committee staff, but not by the IRS to constitute taxable income to the President. Taxable income attributable to improvements for the year 1969 were found by the Joint Committee staff to be $62,441.75 and by the IRS to be $31,844.58. The President has not yet paid tax deficiencies attributable to 1969. Any such payment would be voluntary because the applicable Statute of Limitations has run in respect to that year.

fore the Government Activities Subcommittee of the House Appropriations in June 1973; in hearings before the Government Activities Subcommittee of the House Government Operations Committee in October 1973; in a report by the Comptroller General to the Congress in December 1973; and in a report by the House Government Operations Committee in May 1974. Each investigation concluded that some significant amount of nonprotective improvements on the President's private properties was improperly financed by the Government. This memorandum does not purport to review the accuracy of those determinations, although none of the reports, of course, is conclusive upon the members of this committee as to any issue.

The evidence tending to show Presidential knowledge of the character of these expenditures, the manner in which they were procured, and the source of their financing is as follows:

*1. San Clemente*

a. The President visited San Clemente from March 21 to March 23, 1969.[2] During that period, he and his family had discussions with Harold Lynch, the President's private architectural consultant, regarding the design of the swimming pool to be constructed. Mrs. Nixon also walked the grounds with Lynch and expressed her desire that the renovation work be done in a manner that would preserve the informal atmosphere of the estate. (HJC staff interviews of Harold Lynch)

b. The President visited San Clemente over the period June 4 to June 7, 1969, in conjunction with a trip to Honolulu.[3] During this period discussions were taking place among representatives of the President and Secret Service and GSA personnel regarding work to be performed on the estate.

c. The President visited San Clemente for a month between August 9 and September 8, 1969. (Id.) This period immediately followed the completion of the major renovation work undertaken on the estate.

On August 11, 1969, the President, Ehrlichman, and Kalmbach met in the President's office at the Western White House. Kalmbach's diary notes of that meeting state, "[President] was extremely complimentary re the job that was done on the homesite and . . . [will] host a reception from 6–7 p.m. on Tuesday afternoon. I'm to invite people largely responsible for the success of the project[,]" (Kalmbach diary, 8/11/69) including all Government as well as nongovernmental personnel. (Kalmbach testimony, 3 HJC 657.)

This reception was held the following day and the President expressed his appreciation to many of those attending on an individual basis. (Kalmbach testimony, 3 HJC 657; HJC staff interviews of Richard Hathaway and Harold Lynch.)

d. Alexander Butterfield has testified that the President was "very interested in the grounds at Key Biscayne, Camp David, San Clemente, the cottage, the house, the grounds . . ." (Butterfield testimony, 1 HJC

[2] Library of Congress, Congressional Research Service, "President Nixon's Visits to the Western White House, San Clemente, California" (Source: Agnes Waldron, White House, August 28, 1973).

[3] Library of Congress, Congressional Research Service, "President Nixon's Visits to the Western White House, San Clemente, California" (Source: Agnes Waldron, White House, August 28, 1973).

34.) Kalmbach testified that there was "a great interest [by the President] in all things relative to that [San Clemente] property," and related that on one occasion when he walked the San Clemente grounds with President and Mrs. Nixon the President indicated that he wished the arrangement of various rose bushes to be changed. (Kalmbach testimony, 3 HJC 652.)

The normal and more frequent procedure was for the President to discuss the details of the work and operations at San Clemente with Ehrlichman or H. R. Haldeman, who would pass along instructions. (HJC staff interviews of John Dean.) Kalmbach testified, "I had a standard procedure to run all questions relative to matters pertaining to San Clemente past Mr. Ehrlichman and Mr. Haldeman for their approval and direction. (Kalmbach testimony, 3 HJC 656.)

e. The President visited San Clemente from December 30, 1969, to January 8, 1970.[4]

On January 16, 1970, Kalmbach talked to Ehrlichman by telephone and it was agreed, apparently with the President's assent, that GSA should be given responsibility for the upkeep of the residence. (Book XII, 153.)

f. In total, the President spent 47 days at San Clemente in 1969, 53 days in 1970, 54 days in 1971 and 41 days in 1972.[5]

g. In the February 28, 1973 tape recorded conversation between the President and Dean, the following exchange occurred:

P . . . They can't get his [Kalmbach's] records with regard to his private transactions?
D No . . . that's privileged material.
P That's right.
D Anything to do with San Clemente and, and the like—that is just so far out of bounds that, uh
P Yeah. Did they ask for that?
D No, no, no—No indication.
P Good. Oh well, even if it is.

h. On August 20, 1973, Coopers and Lybrand gave to President and Mrs. Nixon a specific breakdown of the amount and manner of expenditure of their personal funds at San Clemente. (12/8/73 financial statement, 9 Presidential Document 1438.)

i. On December 8, 1973 the President announced his intention to donate his San Clemente residence to the Nation after his and Mrs. Nixon's death. (President Nixon statement, 12/8/73, 9 Presidential Documents 1413.)

*2. Key Biscayne*

a. The President spent 32 days at Key Biscayne in 1969, 34 days in 1970, 47 days in 1971, and 44 days in 1972.[6]

b. In December 1968 the President personally designated the type of fence which he wished to surround the Key Biscayne compound. (Book XII, 163–64.)

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[4] Library of Congress, Congressional Research Service, "President Nixon's Visits to the Western White House, San Clemente, California" (Source: Agnes Waldron, White House, August 28, 1973).

[5] Library of Congress, Congressional Research Service, "President Nixon's Visits to the Western White House, San Clemente, California" (Source: Agnes Waldron, White House, August 28, 1973).

[6] Library of Congress, Congressional Research Service, "President Nixon's Visits to the Florida White House, Key Biscayne, Florida" (Source: Agnes Waldron, White House, August 28, 1973).

c. Construction at the Key Biscayne compound was delayed because of the President's April 2–6, 1969, visit there. GSA documents reflect that during this time the President designated that certain landscape construction be undertaken. (Book XII, 158–59.)

d. On August 20, 1973, Coopers and Lybrand gave President and Mrs. Nixon a specific breakdown on the amount and manner of the expenditure of their personal funds at Key Biscayne. (12/8/73 financial statement, 9 Presidential Documents 1438.)

### *B. Theories of the Evidence*

#### *1. Constitutional Theory*

Article II, Section 1 of the Constitution provides in part:

> The President shall, at stated Times, receive for his services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States or any of them.[7]

#### *2. Criminal Law*

Title 18, § 641 of the United States Code, entitled "Public money, property or records," states:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof; or
>
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both . . .

### *C. Discussion*

The fact that requests for a number of questionable items or costs were initiated by the President personally or by his representatives may be thought to support an argument that the President was aware the Secret Service had not made an independent professional judgment that such an item was necessary for security. Ehrlichman's instructions given prior to the installation of some improvements provide details as to what portions of those expenditures he thought should be publicly financed (as well as displaying some sensitivity to tax implications), (Book XII, 182–84.) and it can be argued that it is unlikely that Ehrlichman did not discuss such personal financial matters with a President whom both Butterfield and Kalmbach described as highly interested in the details of operations at San Clemente.[8] Finally, it can be argued that the effect of the President's announced intention to donate San Clemente to the Federal Government has illusory impact on the emoluments issue, since (a) many of the expenditures, such as landscape maintenance costs, can never be recovered, and (b) the use and benefit of the permanent improvements will continue to be enjoyed for some years by either the President or his family (in some cases perhaps throughout the useful life of the improvement).

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[7] Black's Law Dictionary defines "emolument" as "any perquisite, advantage, profit, or gain arising from the possession of an office."

[8] See supra. It should be noted that Ehrlichman has never been interviewed in connection with the Impeachment Inquiry.

One the other hand, it may be felt that most of these expenditures had a sufficiently plausible security purpose that the President (himself not a technical security expert) would not have been automatically alerted to any potential impropriety. Moreover, even as to items that had no apparent security purpose, it amounts to no more than speculation to say that the President was informed at the time that payment for these items had come out of public rather than personal funds.[9] The President's announced intention to donate his San Clemente property to the United States, after his own and Mrs. Nixon's death, could be regarded as effecting a reimbursement of any emolument he might have received relative thereto.

More fundamentally, it may be thought that the duties and circumstances of a modern President demand that a certain amount of protective benefit be conferred on his person by the Government,[10] and that to impeach a modern President for receipt of such benefit, without a prior demonstration of public or national dissatisfaction with the practice, would represent the imposition of a sanction for breach of a standard of which he did not have fair notice.

The arguments relevant to the legal theory of knowing receipt of converted U.S. funds are largely the same as those applicable to the emoluments clause, except that it would also be necessary to demonstrate that the President had a criminal intent to convert the public property in question to his own use. The existence of such intent tends to be negated by the openness with which the improvements were made; there is no suggestion of the furtiveness commonly associated with conscious efforts to embezzle or convert.

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[9] The summary of information states, at p. 152: "The President knew of the improvements as they were being made from his visits to San Clemente and Key Biscayne; *presumably* he also knew that he was not personally paying for them." (emphasis supplied)

[10] In this regard it should be noted that the GAO report cited significant nonprotective Texas, including $34,000 relating to alterations on President Johnson's airplane hangar Government expenditures in connection with an airstrip located on the LBJ Ranch in there. GAO Report, 87–88. Total expenditures in connection with President Nixon's private properties total approximately $17 million in comparison with approximately $5.9 million spent in connection with President Johnson's private properties. (Book XII, 175.)

## RESPONSE TO COMMITTEE SUBPENAS

The minority staff is not aware of any factual dispute concerning the committee's issuance of subpenas and the President's response to them. The following matters may be noted, in addition to the facts described in the report by the majority staff.

1. 126 of the 147 conversations for which the committee subpenaed tape recordings covered a period of approximately 90 hours (5,361 minutes). The duration of the remaining 21 conversations has not been specified.

2. The letter of February 25, 1974, from the committee's special counsel to the President's special counsel stated:

> We believe the next logical step is to have you outline for us how the White House files are indexed, how Presidential papers are indexed, and how Presidential conversations and memoranda are indexed. We are particularly interested in knowing how the files of Mr. Haldeman, Mr. Ehrlichman, Mr. Colson and Mr. Dean are indexed. If we could work out a way whereby members of the Inquiry Staff may examine these files for the purpose of selecting materials which, in our opinion, are necessary for the investigation, I believe that the inquiry would be expedited.

3. The letter of April 19, 1974, from the committee's special counsel to the President's special counsel requested the following material:

> All papers and things prepared by, sent to, received by, or at any time contained in the files of, H. R. Haldeman, John D. Ehrlichman, Charles W. Colson, John Dean, 3d, Gordon C. Strachan, Egil Krogh, David Young, E. Howard Hunt, G. Gordon Liddy and John Caulfield to the extent that such papers or things relate or refer directly or indirectly to one or more of the following subjects:
>
> 1. The break-in and electronic surveillance of the Democratic National Committee Headquarters in the Watergate office building during May and June of 1972, or the investigations of that break-in by the Department of Justice, the Senate Select Committee on Presidential Campaign Activities, or any other legislative, judicial, executive or administrative body, including members of the White House staff;
> 2. The . . . Huston Plan;
> 3. The activities of the White House Special Investigation Unit.

The subpena of May 30, 1974, required the production of:

> All papers and things (including recordings) prepared by, sent to, received by or at any time contained in the files of, H. R. Haldeman, John D. Ehrlichman, Charles W. Colson, John Dean III, and Gordon Strachan to the extent that such papers or things relate or refer directly or indirectly to the break-in and electronic surveillance of the Democratic National Committee Headquarters in the Watergate office building during May and June of 1972 or the investigations of that break-in by the Department of Justice, the Senate Select Committee on Presidential Campaign Activities, or any other legislative, judicial, executive or administrative body, including members of the White House staff.

4. On July 19, 1974, the committee published as a committee print a set of 21 political matters memoranda from Gordon Strachan to H. R. Haldeman, which had been voluntarily provided by the President to the committee and received by the committee under its Rules of Confidentiality. These included memoranda which were not cited in the committee's statements of information presenting the evidence compiled by its inquiry.

5. On October 18, 1973, Special Prosecutor Archibald Cox, in commenting upon a proposal by the Attorney General, stated that for purposes of his investigation and the grand jury's investigation, he would be satisfied with transcripts of tapes of Presidential conversations, prepared without the participation of the Special Prosecutor's office, omitting material not pertinent and national security material, and paraphrasing material embarrassing to the President, if certain conditions were observed to guarantee the integrity and accuracy of the transcripts, including court appointment of special masters to undertake the work. (Book IX, 774.)

6. The White House has submitted to the committee the materials listed in the committee's "Index to Investigative Files—Materials Received from the White House," given to the members of the committee on May 9, 1974. These materials include the following:

a. Handwritten Notes of the President and H. R. Haldeman. (5 items)
b. Memoranda, Daily Diaries and Other Material. (11 items)
c. White House Political Matters Memoranda, 8/10/71–9/18/72, Gordon Strachan to H.R. Haldeman from (21 items)
d. Documents regarding the Special Investigations Unit ("Plumbers"). (38 categories or items)
e. Documents regarding ITT. (73 categories or items)
f. Documents regarding the Dairy Industry. (20 categories or items)
g. Documents from the files of the Agriculture Department. (620 items)
h. Documents from the files of the Federal Home Loan Bank Board. (98 documents and 8 sets of documents)
i. Documents from the files of the Environmental Protection Agency. (12 files)
j. Documents from the files of the Interior Department. (5 files)
k. Tape recordings of Presidential conversations. (19 recordings or rerecordings)

7. In some cases where the committee did not receive tapes, dictabelts, memoranda, or other documents subpenaed by it, there is no evidence that the tapes, dictabelts, memoranda, or other documents existed.

8. The letter dated April 4, 1974, from the committee's Special Counsel to the President's Special Counsel, stated:

> Of course, if any of the conversations requested in our letter of February 25, concerns a subject entirely unrelated to the matters that I have outlined, the Committee would have no interest therein. In the final analysis, however, the Committee itself would have to make that determination. I am sure it would give careful initial consideration to your response in making its determination as to a particular conversation which you might believe to be totally unrelated to the matters that I have outlined.

This statement was also included in the letter of April 19, 1974, from the committee's special counsel to the President's Special Counsel.

9. The unsigned memorandum accompanying the President's submission of edited White House transcripts to the committee on April 30 stated:

> [The Committee's] subpoena called for the production of tapes and other materials relating to 42 Presidential conversations. With respect to all but three of these conversations, the subpoena called for the production of the tapes and related materials without regard to the subject matter, or matters, dealt with in these conversations. In the President's view, such a broad scale subpoena is unwarranted. . . . [A]s the President has repeatedly stated, he will not participate in the destruction of the office of the Presidency of the United States by permitting unlimited access to Presidential conversations and documents. . . . In order that the Committee may be satisfied that he has in fact dis-

closed this pertinent material to the Committee, the President has invited the Chairman and ranking minority member to review the subpoenaed tapes to satisfy themselves that a full and complete disclosure of the pertinent contents of these tapes has, indeed, been made. If, after such review they have any questions regarding his conduct, the President has stated that he stands ready to respond under oath to written interrogatories and to meet with the Chairman and ranking minority member of the Committee at the White House to discuss these matters if they so desire. ("Presidential Statement," 4/30/74, 92.)

10. Prior to the committee's issuance of the subpena of May 15, the President's Special Counsel submitted responses on behalf of the President to requests of special staff that a subpena issue for tapes of Presidential conversations of April 4, 1972, and June 23, 1972. These responses argued that the evidence then before the committee demonstrated that these tapes were unnecessary to the committee's inquiry, and that therefore subpenas should not be issued for them "to satisfy curiosity or to seek confirmation of undisputed facts."

11. The letter of May 22, 1974, from the President to the chairman of the committee, referring to the two subpenas dated May 15, 1974 stated:

. . . [I]t is clear that the continued succession of demands for additional Presidential conversations has become a never-ending process, and that to continue providing these conversations in response to the constantly escalating requests would constitute such a massive invasion into the confidentiality of Presidential conversation that the institution of the Presidency itself would be fatally compromised. . . .

. . . Continuing ad infinitum the process of yielding up additional conversations in response to an endless series of demands would fatally weaken this office not only in this administration but for future Presidencies as well.

Accordingly, I respectfully decline to produce the [documents subpenaed].

However, I again remind you that if the Committee desires further information from me about any of these conversations or other matters related to its inquiry, I stand ready to answer, under oath, pertinent written interrogatories, and to be interviewed under oath by you and the ranking minority member at the White House. ("Presidential Statements," 5/22/74, 103.)

12. The President's letter of June 9, 1974, to the chairman of the committee stated as follows:

. . . The question at issue is not who conducts the inquiry, but where the line is to be drawn on an apparently endlessly escalating spiral of demands for confidential Presidential tapes and documents. The Committee asserts that it should be the sole judge of Presidential confidentiality. I cannot accept such a doctrine . . .

What is commonly referred to now as "executive privilege" is part and parcel of the basic doctrine of separation of powers—the establishment, by the Constitution, of three separate and co-equal branches of Government. While many functions of Government require the concurrence or interaction of two or more branches, each branch historically has been steadfast in maintaining its own independence by turning back attempts of the others, whenever made, to assert an authority to invade without consent, the privacy of its own deliberations.

. . . If the institution of an impeachment inquiry against the President were permitted to override all restraints of separation of powers, this would spell the end of the doctrine of separation of powers: it would be an open invitation to future Congresses to use an impeachment inquiry, however frivolously, as a device to assert their own supremacy over the Executive, and to reduce Executive confidentiality to a nullity.

My refusal to comply with further subpoenas with respect to Watergate is based essentially on two considerations.

First, preserving the principle of separation of powers—and the Executive as a co-equal branch—requires that the Executive, no less than the Legislative or Judicial branches must be immune from unlimited search and seizure by the other co-equal branches.

Second, the voluminous body of materials that the Committee already has—and which I have voluntarily provided, partly in response to Committee requests and partly in an effort to round out the record—does give the full story of Watergate, insofar as it relates to Presidential knowledge and Presidential actions.

. . . [T]he Executive must remain the final arbiter of demands on its confidentiality just as the Legislative and Judicial branches must remain the final arbiters of demands on their confidentiality. (10 Presidential Documents, 592–94.)

## Subpena Power of the House of Representatives in an Impeachment Inquiry

Each House of Congress possesses an implied constitutional power to compel the production of documents and the testimony of witnesses, as an aid to the intelligent exercise of its constitutional functions. The power was first judicially recognized in the context of a legislative investigation,[1] but it is all the more necessary, and applies "a fortiori, where [a House of Congress] is exercising a judicial function." [2] This is because in exercising a judicial function such as impeachment of Federal civil officers or expulsion of Members from Congress), Congress is likely to be called upon to resolve disputed factual issues, whereas often in legislating the question is not what facts exist but whether, given the facts, the legislation is wise.

The power of the Houses of Congress to compel the production of evidence, however, like all their other powers under our Constitution, is not unlimited.

### Limits on the Power

#### *A. Subject Matter of Investigation*

The congressional power of inquiry exists and is exercised not for its own sake, but only to give Congress information on the basis of which it can make decisions and take actions with which it is charged by the Constitution.[3] The power accordingly cannot be exercised to compel the production of information which is not related to a decision or action entrusted to Congress by the Constitution. As the Supreme Court has stated:

> Congressional investigating Committees . . . are restricted to the missions delegated to them, i.e., to acquire certain data to be used by the House or the Senate in coping with a problem that falls within its . . . sphere. No witness can be compelled to make disclosures on matters outside that area. This is a jurisdictional concept of pertinency drawn from the nature of a Congressional Committee's source of authority.[4]

President Nixon has taken the position that the committee's subpenas have been overbroad in failing to specify the subject matter of many conversations sought. This raises the issue of the relevance of the information sought to any proper subject matter of the committee's inquiry.[5] Ordinarily a witness in a judicial proceeding may not judge the relevance to the subject matter of the case of materials

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[1] *McGrain* v. *Daugherty*, 273 U.S. 135, 174 (1927).

[2] *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 587, 616 (1929).

[3] See *Marshall* v. *Gordon*, 243 U.S. 521, 547 (1927), indicating that even in an impeachment inquiry, the House would not have the power to punish for contempt of its prerogatives unless the exercise of that power was in aid of its impeachment function under the Constitution.

[4] *Watkins* v. *United States*, 354 U.S. 178, 187, 198, 206 (1957).

[5] The committee is authorized under H. Res. 803 to compel the production of all items it deems "necessary" to its inquiry. The alternative of limiting the committee's authority to securing items necessary and relevant, or reasonably calculated to lead to the production of relevant evidence, was considered, but not adopted.

sought from him. It is equally true, however, that the decision as to relevance is not left to the party seeking the evidence. In a judicial proceeding, the determination of relevance is for the court.

Even though the committee has not conducted its inquiry as an adversary of the President, but rather in an impartial fashion, the committee's position is not strictly analogous to that of the court in a judicial proceeding. The committee is also the party seeking to compel the production of the material in question.

It may be for this reason that when a witness before a congressional committee refuses to give testimony or produce documents, the committee cannot itself hold the witness in contempt. Rather, the established procedure is for the witness to be given an opportunity to appear before the full House or Senate, as the case may be, and give reasons why he should not be held in contempt—for example, he can argue that his refusal was justified, or excusable, or based on some mistake. The Supreme Court has held that this kind of notice and opportunity for hearing are constitutionally required, under the fifth and fourteenth amendments, before a legislative body may punish a person for contempt of its prerogatives.[6]

It is not suggested that the House is constitutionally obliged to hold the President in contempt before it may treat his refusal to produce documents as grounds for impeachment, but the Members may feel that the same sort of considerations apply, and support an observance of similar procedures.[7]

It may be argued that the President has now had an opportunity to "show cause" before the committee why his response was satisfactory. (The brief dated July 19, 1974, and submitted to the committee on behalf of the President, did not address the issue, although it states that the President's Special Counsel would welcome the opportunity to respond to any committee requests for further submissions.) However, there has been no opportunity to make this showing before the full House, as is the traditional procedure of the House. It may be doubted whether the President's Special Counsel would be granted the opportunity to show cause before the full House, if the committee recommended that the President be impeached for his response to the committee's subpenas.

### *B. Privileges to Withhold Information*

Despite the public interest in having Congress secure information, sometimes our law recognizes a countervailing interest in permitting a person who is subpenaed to withhold information. For example, the fifth amendment privilege against self-incrimination has been

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[6] *Groppi* v. *Leslie*, 404 U.S. 496, 500 (1972). As the Supreme Court there noted, Congress had long followed these procedures as a matter of policy, in order to insure fairness to witnesses and persons summoned to produce evidence, rather than as a matter of constitutional command.

[7] It seems somewhat strained to rely upon Senate review to discharge this function, i.e., to regard a trial of the President by the Senate as "arbitrating" the initial dispute between a President and the House as to whether a Presidential response to a subpena was satisfactory. Impeachment by the House is a sufficiently important step so that every reasonable effort should be made to insure the integrity and accuracy of the result reached in the House. Due process cannot be left until the Senate.

held applicable in an impeachment inquiry.[8] Similarly, the privilege for confidential communications between attorney and client has been recognized and honored by committees of Congress in both legislative and impeachment investigations.[9]

*1. Presidential privilege*

In the present case, the President has claimed a privilege to withhold information based upon the need to maintain confidentiality between the President and his advisers, so as to promote the candid exchange of advice and views among them, and insure efficient and fully-informed decisionmaking at the Presidential level. The President argues that, despite a congressional need for access to his conversations to support and assist a congressional decision, the President has to be able to maintain the privacy of those conversations, when he deems it essential, in order to preserve the unfettered character of his conversations with his aides, and hence the integrity of all the decisions which he makes as head of the co-equal executive branch.

The courts have recognized the validity of this as "one species of executive privilege—that premised on 'the great public interest in maintaining the confidentiality of conversations that take place in the President's performance of his official duties.' "[10] They have held that "presidential conversations are 'presumptively privileged,' even from the limited intrusion represented by in camera examination of the conversations by a court."[11] They have also held that the presumption of privilege can be overcome, depending upon the circumstances of the case.[12] The President is presently litigating the latter question in a nonimpeachment context before the Supreme Court.

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[8] In 1879, for example, impeachment proceedings were brought against George Seward, Consul-General and Minister of the United States in China during the administration of President Hayes. The report of the House Judiciary Committee in that case stated:

"The committee procured a subpena . . . Mr. Seward appeared in obedience to the subpena, but declined to be sworn as a witness in a case where crime was alleged against him, and where articles of impeachment might be found against him, claiming, through his counsel, his constitutional privilege of not being obliged to produce evidence in a criminal case tending to criminate himself.

"* * * If these books of Mr. Seward's are his private books * * * or whether they contain records of his action as a public officer intermixed or otherwise with his private transactions, it is believed he cannot be compelled to produce them."
H.R. Rep. No. 141, 45th Cong., 3d Sess. (1879).

Dean Wigmore also states that the fifth amendment is applicable in impeachment proceedings. 8 Wigmore, *Evidence* (McNaughton rev., 1961) § 2257, p. 357, citing *United States* v. *Collins*, 25 Fed Cas. 545, 549 (No. 14, 837) (C.C.S.D. Ga., 1873); *Thruston* v. *Clark*, 107 Cal. 285, 40 P. 435 (1895); *Daugherty* v. *Nagel*, 28 Idaho 302, 154 P. 375 (1915); *Nye* v. *Daniels*, 75 Vt. 81, 53 Alt. 150 (1902).

[9] Impeachment inquiries: see Proceedings of the House of Representatives in the following impeachment investigations: Marshall, pp. 687, 688, 693 ("The Committee will enforce the rule, as long as counsel raises the question of privilege. Even if the counsel were disposed to testify about a privileged matter, the committee would not permit him to do so. No counsel has the right, even if willing to do so, to testify about a matter that he himself does not avail himself of the privilege. Any court may compel him to recognize the privilege and we would not permit him to testify to privileged matter."); Anderson, p. 166 (Chairman questions competency of conversation between attorney and client); and Archbald, pp. 1413–14 (committee will respect privilege, but committee will ascertain whether privilege applies.).

Legislative inquiries: see *Keeney* v. *United States*, 218 F. 2d 843, 850 (D.C. Cir. 1954) (privilege apparently applicable); Landis, "Constitutional Limits on Congressional Investigations," 40 Harv. L. Rev. 153, 219 (1926) (same); *Civil Aeronautics Board* v. *Air Transport Ass'n of America*, 201 F. Supp. 318 (D. D.C. 1961) (privilege applicable in agency investigations). Compare *Jurney* v. *MacCracken*, 294 U.S. 125, 144–46 (1935), (privilege apparently not sustained by Congressional Committee); 3 Hinds, Precedents of the House of Representatives § 1689 (same).

[10] *Senate Select Committee* v. *Nixon*, D.C. Cir. Civ. No. 74–1258 (May 23, 1974), slip opinion at 9; *Nixon* v. *Sirica*, 487 F. 2d 700, 717 (D.C. Cir., 1973).

[11] *Nixon* v. *Sirica*, *supra* n. 10, at 705, 717–18; *Senate Select Committee* v. *Nixon*, *supra* n. 10, at 9.

[12] In the *Senate Select Committee* case the circuit court upheld the President's claim of privilege; in the *Sirica* decision the claim was disallowed.

The President seems to have taken the position, in effect, that, once he determines his privilege must be invoked to safeguard the integrity of Presidential decisionmaking, his determination can never be challenged by another branch of Government. This amounts to a claim of absolute privilege. It is evident that an across-the-board exercise of an absolute privilege could effectively stymie the power of Congress under the impeachment clause. It has accordingly been argued that in the context of an impeachment investigation, the President can have no privilege whatsoever to keep material confidential, that is, that the decision of the House or its committee must be absolute and unreviewable. Upon analysis, it does not seem necessary to accept either absolute rule.

### ARGUMENTS FOR A FLAT NO-PRIVILEGE RULE IN IMPEACHMENT INQUIRIES

In his letter of June 9, 1974, the President appears to rest his argument upon the separation of powers among the three branches of the Federal Government. This is a difficult argument to sustain in the context of an impeachment inquiry, since the impeachment clause was a deliberate exception to the separation of powers, adopted at the Federal Convention of 1787 only after debate.[13]

Second, it is hard to see how any privilege based upon the fact of a President's incumbency should apply in a constitutional proceeding designed to test that incumbency.

Third, the power to impeach and remove a President would be sterile if it did not include the power to secure information upon which to act. Arguably, it would not be a sensible construction of the impeachment clause to suppose that the Framers intended the House to make an uninformed (or less than a fully informed) decision regarding impeachment. In a sense, the uninformed exercise of a power is the exercise of arbitrary power—antithetical to the spirit of our Constitution.

### ARGUMENTS AGAINST A FLAT NO-PRIVILEGE RULE IN IMPEACHMENT INQUIRIES

First, the fact that the power of "impeachment" is an exception to the separation of powers does not answer the question of how far the exception was meant to extend, and how far the impeachment power was meant to cut across Presidential powers other than the right to remain in office. For example, in cases of impeachment the President loses his pardoning power—but the Framers thought it necessary to spell this out in the Constitution. (Article II, section 2, clause 1.)

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[13] See 2 The Records of the Federal Convention of 1787 (M. Farrand ed., 1911) 63–69. As Elias Boudinot stated in the First Congress, the impeachment power was among the constitutional "exceptions to a principle, that is, the independence of the branches. 1 Annals of Congress 527. It is probably for this reason that many past President's have stated that their power to withhold information from Congress would cease to apply in an impeachment proceeding. The statement of President Polk, that in an impeachment situation the House's power of inquiry "would penetrate into the most secret recesses of the Executive Departments," is perhaps the best known.

It may be noted, however, that these statements by past Presidents arose in the context of congressional investigations which were not impeachment inquiries. Often they may have represented a harmless nod in the direction of Congress' inquisitorial power, in the context of a Presidential refusal to turn over documents. It may therefore seem less appropriat to view these statements as settling the "law" of Presidential privilege in an impeachment situation. The limit of Congressional subpoena power was not an issue in the only prior Presidential impeachment investigations, those involving Andrew Johnson in 1867 and 1868.

It may be argued that the "exception" represented by the impeachment clause is limited to Congress' power to bring the President to trial in the Senate and to remove him from office if he is convicted, and that it cannot extend to requiring him to spread his record before the Congress as a condition of remaining in office.

It may also be argued that the President's (and the public's) need to maintain the confidentiality of the Presidential decisionmaking process, when the President deems it necessary to do so, supports a privilege independently of the separation of powers. Counsel to the President have argued that the need for confidentiality is both broader and deeper than the legal separation of the three branches.[14] If this view is taken, it may make little difference that the impeachment power represents an exception to the doctrine of separation of powers.

With respect to the second argument advanced above in favor of a no privilege rule, it should be said that the President has consistently bottomed his argument not upon his interest in the privacy of his own conversations, but upon the undesirability of a no-privilege rule which would apply to all future Presidents. His argument, in other words, does not rest upon the fact of his incumbency, but upon the nature of the Presidential decisionmaking process.

With respect to the third argument advanced above; namely, that an uninformed exercise of the impeachment power would be pointless and arbitrary, it may be urged that the President has not suggested that all the committee and the House can do is to take a vote. He denies not the power to conduct an inquiry, which the committee has done in any case, but the power to compel produtcion of Presidential documents as against a Presidential assertion that their production would not be in the public interest.

Finally, a flat no-privilege rule for impeachment investigations could permit or even foster unfortunate developments. The President raises the possibility, in his letter of June 9, 1974, that such a rule "would be an open invitation to future Congresses to use an impeachment inquiry, however frivolously, as a device to assert their own supremacy over the Executive, and to reduce Executive confidentiality to a nullity." It may be objected that the mere possibility of abuse of a power of inquiry is no argument against its existence.[15] But we are not concerned here with the existence of a power of inquiry; rather with the existence of a limit to that power. It "will not do to say that the argument is drawn from extremes. Constitutional provisions are based on the possibilities of extremes." [16]

In a way, the misuse of the impeachment power so as to eliminate Executive confidentiality is not the greatest possible abuse. The extreme case would be the removal of a President for no other grievance than his refusal to comply with an impeachment committee's subpena.[17] The relations between congressional investigating committees and the Executive have not been always so tranquil in our history as to

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[14] The privilege recognized by the Court of Appeals for the District of Columbia appears to rest at least as much on the "need for confidentiality" as on the separation of powers. See cases cited in n. 10, supra.

[15] *McGrain* v. *Daugherty*, 273 U.S. 135, 175 (1927).

[16] *General Oil Co.* v. *Crain*, 209 U.S. 211, 226–27 (1908).

[17] It should be borne in mind that the question whether a refusal to comply with a subpena constitutes in itself an impeachable offense is distinct from the question whether a refusal to produce evidence can give rise to an "adverse inference" regarding independent charges.

indicate that such a conjecture is fanciful.[18] Yet if the rule is laid down that as a matter of fundamental constitutional law, a President can under no circumstances enjoy any privilege to withhold documents or testimony from a duly designated impeachment committee, then the mere attempt to exert such a privilege might be argued to afford sufficient grounds for his removal—a sort of default judgment.

### NO ABSOLUTE PRESIDENTIAL PRIVILEGE IN IMPEACHMENT INQUIRIES

Even if the flat no-privilege rule is rejected, this does not mean that an Impeachment Inquiry Committee may never properly exercise its impeachment power as the ultimate sanction against Presidential nondisclosure of materials. When a President determines to withhold material in the context of an impeachment investigation—as it is always within his physical power to do—he relies, in the words of Chief Justice Marshall, upon "political powers, in the exercise of which he is to use his own discretion, accountable only to his country in his political character and to his own conscience." [19] As the House Committee on the Judiciary stated in its report in connection with the Seward impeachment inquiry in 1879:

> "The subpoena duces tecum should be issued to the highest executive officer having charge, custody, and control of such public records. Since the case of Burr . . . the usual course has been for a Committee of Congress to direct a letter to the head of the proper department, or House, by resolution, to call upon the proper executive officer, to produce the same, leaving that officer to get possession of the books from his subordinate by any lawful means. . . . All resolutions directed to the President of the United States to produce papers within the control of the Executive, if properly drawn, contain a clause, 'if in his judgment not inconsistent with the public interest.' And whenever the President has returned (as sometimes he has) that, in his judgment, it was not consistent with the public interest to give that House such information, no further proceedings have ever been taken to compel the production of such information. Indeed, upon principle, it would seem that this must be so. The Executive is as independent of either House of Congress as either House of Congress is independent of him, and they cannot call for the records of his action or the action of his officers against his consent.
>
> The mischief of the House calling for documents might easily be a very great one. Suppose the President is engaged in a negotiation with a foreign government, one of a most delicate character . . . and which it is vitally necessary to keep secret. . . . Somebody must judge upon this point. It clearly cannot be the House or its Committee, because they cannot know the importance of having the doings of the Executive Department kept secret. The head of the Executive Department, therefore, must be the judge in such case and decide it upon his own responsibility to the people, and to the House, upon a case of impeachment brought against him for so doing, if his acts are causeless, malicious, willfully wrong, or to the detriment of the public interest." [20]

### CONCLUSION

On balance, the soundest long range view seems to be that the President's privilege to protect the privacy of his decisionmaking process does not automatically fall whenever an impeachment inquiry is authorized, and that his invocation of the privilege in the context of an impeachment investigation should not automatically trigger his re-

[18] The relations between President Lincoln and the Committee on the Conduct of the War come to mind.
[19] *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137, 165 (1803).
[20] H.R. Rep. No. 141, 45th Cong., 3d Sess. (1879).

moval from office. An apparent noncompliance with an impeachment committee's subpena is the beginning, not the end, of the question.

It must be determined, first, that the refusal to comply was not justifiable or excusable. The committee members will wish to assess the reasonableness, under all the circumstances, of the President's decision with respect to the limits of Congress' investigative power and the limits of his own privilege to guard the confidentiality of his conversations and other personal records. In making this assessment, the committee members may wish to consider, in the light of any Presidential statements or arguments, the relevance of the materials sought to the subject matter of the committee's inquiry; the degree of necessity of the materials sought; the quantity of material sought and the scope of the subpenas asserted by the President to be overboard; the extent to which the President has turned over Presidential records of various kinds to the committee, in response to subpenas or without being subpenaed; and the efficacy of the alternative means proposed by the President for verifying information provided to the committee or providing the committee with additional information, such as inspection of original tapes, sworn answers to interrogatories, and oral interviews. The members may perhaps feel it desirable to permit the President—or his counsel—to express his views as to these matters, or other factors he may believe to bear upon whether his response to the committee's subpenas and other requests for information were, on the whole, justifiable.

If, after undertaking the above examination, the members of the committee believe that the President's actions in this matter were not constitutionally justifiable, they must address the question whether the President has conducted himself in a manner so seriously contemptuous and destructive of the relation and balance which ought to exist between the Government's branches, as to merit removal from office.[21]

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[21] If there is no factual dispute with respect to the President's response to the committee's subpenas and other requests for information, the standard of grounds for impeachment by the House would seem to be the same as the standard for conviction and removal by the Senate.

# TAX DEDUCTION FOR GIFT OF PAPERS

## Introduction

A threshold question arises when the President's payments of his personal income tax are considered as ground for his impeachment. This is whether the alleged offense—even if it is alleged that criminal tax fraud occurred—bears a sufficient relation to the President's office. "As a technical term, a 'high' crime signified a crime against the system of government, not merely a serious crime. This element of injury to the commonwealth—that is, to the State itself and to its Constitution—was historically the criterion for distinguishing a 'high' crime or misdemeanor from an ordinary one. The distinction goes back to the ancient law of treason, which differentiated 'high' from 'petit' treason." [1] The definition of grounds for impeachment in the Constitution had been "treason, bribery or other high crimes and misdemeanors against the State" (later "against the United States")—the last words being dropped in the final draft of the Constitution by the Committee on Style and Revision, as a stylistic change only. Unless the words "against the State" meant that the conduct in question had to be criminal (and hence a violation of the laws of the State), they must have meant that the conduct had to have some impact on the governmental system of the State, or the position of the officer in that system. As the committee staff's Report on Grounds for Presidential Impeachment concluded:

> Where the issue is presidential compliance with the Constitutional requirements and limitations on the Presidency, the crucial factor is not the intrinsic quality of behavior but the significance of its effect upon our Constitutional system or the functioning of our government.[2]

There are theories on which the President's personal income taxes may be thought to relate to his office. First, it may be argued that every citizen, no matter what his station, owes an obligation to his Government to pay the full amount of personal income tax for which he is liable in any year. This is true; but every citizen also has an obligation to his Government not to violate any criminal law established by that Government, and yet not every criminal offense is sufficiently related to governmental office to constitute grounds for impeachment. An interpreter of our Constitution wrote in 1829, when the Constitution was still relatively fresh, that except for treason and bribery, "all offenses not immediately connected with office," including "murder, burglary, robbery," were "left to the ordinary course of judicial proceedings." [3] It was no accident that every article of impeachment voted against President Andrew Johnson in 1868 recited that conduct in question occurred "in office."

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[1] "Constitutional Grounds for Presidential Impeachment." Report by the Staff of the Impeachment Inquiry, Committee on the Judiciary, House of Representatives, 93d Congress, 2d Session (February 1974), p. 12, n. 51.

[2] Id., p. 27.

[3] W. Rawle, A View of the Constitution (1829). Compare J. Story, Commentaries on the Constitution of the United States, §§ 801, 802 (1905 ed.).

Second, it may be argud that nonpayment of taxes or tax evasion by a President is related to his office, and indeed is particularly to be condemned, because the President is ex officio in charge of the collection of all taxes, since he is the head of the executive branch. Again, this argument could be made of all crimes. But beyond that, it may be doubted whether a greater burden of obedience should be placed upon the President because his office represents the apex of our system of laws. Should a President be impeachable for private conduct constituting a crime, but an inferior officer not so?

Similarly, the summary of information concerning the President's taxes seems to suggest (at p. 10) that a violation of the tax law "would be particularly serious on the part of the President if it entailed an abuse of the power and prestige of his office." "As Chief Executive," the report continues, "he might assume that his tax returns were not subject to the same scrutiny as those of other taxpayers. It was unlikely, for example, that the Archives would question a President as to the date of his gift." The more reasonable view would seem to be, however, that private conduct is not automatically transformed into an "abuse of official power," in the case of a President, simply because of the attitude which other persons may entertain toward the Presidency.

Despite the foregoing, it should be said that two of the articles of impeachment against Judge Halstad L. Ritter in 1936 charged willful tax evasion. However, these articles were added by the House Managers after the House had already voted a set of articles, so that the tax charges were never separately discussed and voted on by the full House.[4] Judge Ritter was acquitted on these articles.

The joint committee disavowed any attempt to "draw any conclusions whether there was, or was not, fraud or negligence involved in any aspect of the returns, either on the part of the President or his personal representatives." (Joint Committee Report, 4.) This disavowal was predicated on the fact that this committee was then involved in an investigation of whether grounds exist for the impeachment of the President.

The IRS, on the other hand, in the course of the investigation, concluded that "inconsistencies abound[ed]" between the various stories of the President's representatives involved in the gift of papers, and that a grand jury investigation was warranted to determine whether fraud had been committed by these representatives. (Book X, 402.) However, like the joint committee, the IRS made no allegations of fraud against the President.

On April 2, 1974, the fraud investigation was formally referred to the Special Prosecutor in the names of three of the President's representativs: Frank DeMarco, his attorney; Ralph Newman, the appraiser of the papers; and Edward L. Morgan, formerly Deputy Counsel to the President. (Book X, 403–04.) The Special Prosecutor has recently begun a grand jury investigation.

The evidence with respect to Presidential involvement is as follows:

In a meeting between then President-elect Nixon and President Lyndon Johnson in 1968, President-elect Nixon became aware of the possibility of making a gift of his historical papers, and taking a

[4] 80 Cong. Rec. 4599–4601 ; id. 3066–92.

charitable deduction on his Federal income tax return for their fair market value. (Book X, 1.) In mid-December 1968, the President had discussions with Richard Ritzel, then his tax attorney, concerning the feasibility and requirements of such a gift, and on December 27 or 28, 1968 he received from Ritzel two versions of the 1968 deed of gift and a covering explanatory memorandum. (Book X, 1–2.) On the evening of December 28, 1968, the President telephoned Mr. Ritzel, and they discussed Ritzel's memorandum and the restrictions on public access to the papers contained in one or both deeds. (Book X, 2.) Mr. Nixon signed the 1968 deed, which was transmitted back to Mr. Ritzel, who then completed arrangements for the 1968 gift. (Book X, 2–3.) The President signed his 1968 tax return, which included a deduction of $70,552 for the 1968 gift. The remaining $9,447.73 was made available as a deduction carryover for future years. In accordance with IRS regulations, a statement was attached to the return including information as to the existence of any restrictions on the gift. It said in substance that the gift was free and clear, with no rights remaining in the taxpayer. (Book X, 3.) [5]

On February 6, 1969, John Ehrlichman sent a memorandum to the President in regard to gifts and charitable contributions. In this memorandum, Ehrlichman recited the 1968 gift of papers, and suggested that the President could continue to obtain the maximum charitable deduction of 30 percent of his adjusted gross income by first contributing to charity proceeds from the sale of the President's writing in an amount equal to 20 percent of his adjusted gross income. With respect "to the remaining 10 percent," Ehrlichman's memorandum noted that it would "be made up of a gift of your papers to the United States. In this way we contemplate keeping the papers as a continuing reserve which we can use from now on to supplement other gifts to add up to the 30 percent maximum." There is a notation on the memorandum, apparently in the President's handwriting, which states "1. Good. 2. Let me know what we can do on the foundation idea." There is no reference in this memorandum to making a bulk gift of papers in the year 1969 which would be sufficient for the President's 30 percent charitable deduction for 1969 and succeeding years. (Book X, 3.) On June 16, 1969, Ehrlichment sent two memorandums to Deputy Counsel Morgan dated June 16, 1969. One of these memoranda mentioned the full 30 percent deduction for the 1969 tax year and posed questions purportedly raised by the President himself in regard to his taxes. (Book X, 8–9.) [6]

On November 7, 1969 Ralph Newman sent a preliminary appraisal to the President, valuing the President's pre-Presidential papers at slightly over $2 million. (Tax Report, n. 38.) On November 16, 1969 Newman attended a White House prayer breakfast. Newman stated to the staff at his interview that as he stood in the receiving line and introduced himself to the President, he asked the President if he had received the preliminary appraisal. The President replied that he did receive the appraisal, and stated that he did not believe that the

[5] It may be argued that the facts in this paragraph indicate that the President was involved in and was aware of the requirements and procedures for the 1968 gift of papers; and that the President had had experience of at least one method of executing a gift of his papers.

[6] It may be argued that the facts in this paragraph are probative of the proposition that the President did not have an intention in 1969 of making a bulk gift of papers with carryover consequences.

figure could be so high. Newman told the President that the figure was a conservative estimate. (Book X, 9.) [7]

On December 30, 1969 the President signed the Tax Reform Act of 1969. This extremely complex statute [8] contained a provision retroactively establishing a cutoff date of July 25, 1969 for effective charitable donations of papers. (Tax Report, n. 45)

The final instance of Presidential involvement in the events leading to the gift of papers is the President's signing of his 1969 tax return on April 10, 1970. On that date, the President's attorney, Frank DeMarco, met with the President and explained the tax return to him, including the deduction for the gift of papers. Herbert Kalmbach was present at that meeting, and has testified before the committee that the President and DeMarco went over the return page by page [9] and discussed the tax consequences of the gift of papers deduction (Kalmbach testimony 3 HJC 670–71). In his interview with the staff, DeMarco said that his explanation to the President consisted of DeMarco's pointing to the appraisal by Newman and stating, "This, of course, is the appraisal supporting the deduction for the papers which you gave away." According to DeMarco, the President's response was "That's fine." DeMarco has said there was no discussion about the deed giving the gift of papers to the United States. DeMarco told the President that the gift of papers would be a tax shelter for several years. DeMarco has stated that there was no in-depth analysis of the tax return while he was with the President, but he said there was no question that the President knew he was getting a refund and that a basis for the refund was the deduction taken for the gift of papers. Shortly thereafter, DeMarco met with Mrs. Nixon and obtained her signature on the return. (Book X, 17.)

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[7] It may be argued that the facts in this paragraph are probative of the proposition that, as of November, 1969, the President did not have an understanding that a gift of his papers

[8] Based on the President's signature of this statute, which takes up more than 300 pages had been made in April of that year.
in the U.S. Code Congressional and Administrative News, the summary of information concludes, "There can be no doubt that the President knew that the Tax Reform Act required that, for the claim of a deduction to be valid, a gift must be completed by July 25, 1969."

[9] The statement that the gift had been made on March 27, 1969 was contained in an attachment to the return. (Book X, 5.)

The minority staff submit that the issue with respect to the President's taxes is not whether the deduction for the gift of papers was valid or invalid.[1] Nor is the issue whether any personal representative of the President committed fraud in connection with the gift of papers or the preparation of the return. The primary issue is whether the President committed acts constituting willful tax evasion.[2]

Section 7201 of the Internal Revenue Code, entitled "Attempt to Evade or Defeat Tax," provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000.00, or imprisoned not more than five years, or both, together with cost of prosecution.

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[1] Under applicable law, the burden of establishing the validity of the deduction falls upon the President. The burden of proof in this inquiry was not with the President.

[2] As the summary of information states, "Mere mistake or negligence by the President in filing false tax returns would clearly not provide grounds for impeachment." (Summary of information, 172.)

## Discussion

In order to establish a case of willful tax evasion under Section 7201, there must be proof not only of willingness on the part of the taxpayer, but also of affirmative acts of wrongdoing, such as deceit, concealment, misrepresentation, and the other usual "badges of fraud." In *Spies* v. *United States*, 317 U.S. 492 (1943), the Supreme Court stated:

> By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal.

Other cases are instructive on the character of acts necessary to constitute fraudulent deductions. Such fraudulent deductions include the fraudulent taking of unjustified deductions based on false inventory, *United States* v. *Kelley*, 105 F. 2d 912 (2d Cir. 1939); the claiming of extensive deductions for losses on sales of securities where the securities were sold to close friends at bargain prices and very shortly bought back by the taxpayer, *United States* v. *Schenck*, 126 F. 2d 702 (2d Cir. 1942) *cert. denied sub. nom. Moskowitz* v. *United States*, 316 U.S. 705 (1942); and the claiming of a loan made by the taxpayer and taken as a deduction for "purchases," thus reducing income, *Barshop* v. *United States*, 192 F. 2d 699 (5th Cir. 1951), *cert. denied*, 342 U.S. 920 (1952).

It may be argued that the 1970 events reveal affirmative acts of wrongdoing on the part of the President's personal representatives, Newman, DeMarco and/or Morgan.[1] However, it is difficult to see how the President could be charged with willfulness or with an affirmative act of wrongdoing unless he knew of any fraudulent acts by his personal representatives. The evidence does not seem to bear out Presidential knowledge of fraudulent acts by his subordinates in connection with his tax returns.

On the one hand, it can be argued that it is doubtful that DeMarco, Newman, and Morgan would undertake a coordinated scheme of falsification on their own without checking with the taxpayer or one of his close advisors. The gift of papers was of enormous importance to the President's financial posture and was also of some historical significance. The three men involved herein were not customarily

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[1] The President has stated that he relied on his lawyer, tax accountant, and other subordinates to handle the gift. A White House press statement dated April 4, 1974 states that any errors committed by the President's tax consultants were done without the President's approval.

The Summary of Information does not address this issue. Good faith reliance on one's attorney is a defense by a finder of fact. In a criminal trial if the defendant raises the defense that he relied on someone else to prepare the return, he is entitled to an instruction on that issue, since the doctrine of *respondeat superior* applicable to a civil case would not apply in a criminal case. It should appear from the circumstances that the advisor had an apparent competence in the tax field. In addition there must be a showing that the taxpayer actually believed and followed the advice.

handling personal affairs of the President of such magnitude without some guidance. In addition, when the President signed his 1969 tax return, he knew that he had signed a deed in connection with the 1968 gift: and yet he had signed no deed for the 1969 gift—although since assuming the Presidency in January, 1969, the President had probably grown more accustomed to acting through agents in his personal affairs.

The short answer to the case of imputed knowledge and inferred intent upon which any fraud allegations would have to rest in this instance is that the mere fact that a taxpayer has signed his tax return is not enough. If the burden is on the committee to establish the elements of Presidential fraud, that burden simply is not carried by the evidence recited above, which falls far short of demonstrating on the part of the President, any act of deceit, concealment, misrepresentation, or the other usual "badges of fraud." Although the committee and staff have interviewed two of the participants in the meeting of April 10, 1970, at which the President signed his 1969 tax return, neither witness stated that the President was informed or even asked about the details of the gift. Indeed, none of the witnesses in the case interviewed by the staff has indicated that the President had any awareness of the details of the circumstances surrounding the gift of papers.[2]

The summary of information argues that willfulness and knowledge "may be inferred from all the events and circumstances surrounding the making of the gift and the preparation and execution of the tax return." (Summary of information, 172). Willfulness and knowledge on the part of the President cannot be inferred merely from the evidence before this committee concerning essentially the acts of other individuals.

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[2] In regard to the absence of evidence of Presidential knowledge, the failure of the staff to submit interrogatories to the President must weigh heavily in considering whether the committee is acting on a complete record. Such written questions can be narrowly drawn to elicit narrow responses, as the interrogatories drafted by the joint committee demonstrate. The President has indicated that he would submit written responses under oath to such interrogatories if submitted by this committee, but to date the committee has not seen fit to avail itself of that opportunity.

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